Docket for 02-1667

No. 02-1667	Status: ARGUED
Title:	Tennessee, Petitioner v. George Lane, et al.
Docketed:	May 15, 2003
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Nos.:	(98-6730)
Decision Date:	January 10, 2003

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Feb 21 2003	Application (02A714) to extend the time to file a petition for a writ of certiorari from April 10, 2003 to May 12, 2003, submitted to Justice Stevens.
Feb 26 2003	Application (02A714) granted by Justice Stevens extending the time to file until May 12, 2003.
May 12 2003	Petition for writ of certiorari filed. (Response due June 16, 2003)
May 30 2003	Brief of respondent United States filed.
Jun 2 2003	Brief of respondents George Lane and Beverly Jones filed.
Jun 3 2003	DISTRIBUTED for Conference of June 19, 2003.
Jun 23 2003	Petition GRANTED Limited to Question 1 presented by the petition.
Jul 14 2003	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including September 8, 2003.
Sep 8 2003	Brief of petitioner Tennessee filed.
Sep 8 2003	Joint appendix filed.
Sep 8 2003	Brief amicus curiae of Alabama, et al. filed.
Sep 12 2003	Extension of time within which to file respondent's brief on the merits to and including November 11, 2003.
Sep 16 2003	Letter of petitioner proposing a lodging.
Oct 8 2003	Extension of time within which to file government's brief on the merits to and including November 12, 2003.
Oct 21 2003	Consent to the filing of amicus briefs in support of the respondents received from counsel for the respondents.
Nov 3 2003	SET FOR ARGUMENT Tuesday, January 13, 2004.
Nov 4 2003	CIRCULATED.
Nov 12 2003	Brief amici curiae of Paralyzed Veterans of America, et al. filed.(Distributed).
Nov 12 2003	Brief amicus curiae of Training and Advocacy Support Center of Natl. Assn. of Protection and Advocacy Systems filed. (Distributed).
Nov 12 2003	Motion for leave to file amicus brief filed by Richard Stevens. (Distributed)
Nov 12 2003	Brief of respondent United States filed. (Distributed)
Nov 12 2003	Appendix to brief of the United States filed. (Distributed)
Nov 12 2003	Brief amici curiae of Dick Thornburgh, et al. filed. (Distributed)
Nov 12 2003	Brief amici curiae of Kansas and Delaware filed. (Distributed)
Nov 12 2003	Brief amici curiae of Minnesota, et al. filed. (Distributed).
Nov 12 2003	Brief of respondents George Lane and Beverly Jones filed.(Distributed).
Nov 12 2003	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.

	(Distributed).
Nov 12 2003	Brief amicus curiae of American Bar Association filed. (Distributed)
Nov 13 2003	Lodging proposal by counsel for petitioner.
Nov 13 2003	Motion for divided argument filed by respondent the Solicitor General.
Nov 14 2003	Brief amicus curiae of Blanche Fischer Foundation filed. (Distributed)
Nov 18 2003	Record received from the U.S.C.A. for the Sixth Circuit.
Nov 26 2003	Motion for leave to participate in oral argument as amici curiae and for divided argument filed by Alabama, et al.
Dec 1 2003	Motion for leave to file amicus brief filed by Richard Stevens DENIED.
Dec 1 2003	Record received from the U.S.D.C. for the Middle Dist. of Tennessee (1 box)
Dec 8 2003	Motion for divided argument filed by respondent GRANTED.
Dec 8 2003	Motion for divided argument filed by Alabama, et al. DENIED.
Dec 17 2003	Reply of petitioner Tennessee filed. (Distributed)
Jan 13 2004	Argued. For petitioner: Michael E. Moore, Solicitor General, Nashville, Tenn. For respondents Lane and Jones: William J. Brown, Cleveland, Tenn. For respondent United States: Paul D. Clement, Deputy Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
FILED

No02166-7 MAY 1 2 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

GEORGE LANE, BEVERLY JONES, and UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

PAUL G. SUMMERS
Attorney General & Reporter
State of Tennessee
MICHAEL E. MOORE*
Solicitor General
S. ELIZABETH MARTIN
Senior Counsel
MARY MARTELLE COLLIER
Assistant Attorney General
Civil Litigation & State Services Division
P. O. Box 20207
Nashville, Tennessee 37202
Telephone: (615) 741-2471

Attorneys for Petitioner
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

54 pp

QUESTIONS PRESENTED

1. Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 (2002), exceeds Congress's authority under section 5 of the Fourteenth Amendment, thereby failing validly to abrogate the states' Eleventh Amendment immunity from private damage claims.

2. Whether the abrogation analysis under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 (2002), differs when an individual Title II claim is purportedly tied to due process concerns rather than equal protection concerns.

LIST OF PARTIES

The Plaintiffs in this action are George Lane and Beverly Jones. In addition to the State of Tennessee, twenty-five Tennessee counties – Bledsoe, Cannon, Chester, Claiborne, Clay, Cocke, Decatur, Fayette, Grainger, Hancock, Hawkins, Hickman, Houston, Jackson, Jefferson, Johnson, Lake, Lewis, Meigs, Moore, Perry, Pickett, Polk, Trousdale, and Van Buren – were also named as defendants in the district court. The United States intervened as a party pursuant to 28 U.S.C. § 2403 in the Sixth Circuit. Only the parties named in the caption were parties on appeal to the Sixth Circuit.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions	2
Statement of the Case	3
Reasons for Granting the Petition	8
I. There Is a Clear Split among the Circuits Concerning Whether, under Title II of the ADA, Congress Has Validly Abrogated State Sovereign Immunity under the Eleventh Amendment	10
II. The Sixth Circuit's "As-Applied" Analysis Announced in *Popovich* and Employed in This Case Conflicts with This Court's Decisions Delimiting Congress's Section 5 Authority to Abrogate Eleventh Amendment Immunity	15
Conclusion	19
Appendix	App. 1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (*en banc*), *cert. granted*, 528 U.S. 1146, *cert. dismissed*, 529 U.S. 1001 (2000) 9, 12, 18

Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) ..... *passim*

Bruggeman v. Blagojevich, 324 F.3d 906 (7th Cir. 2003) 12

City of Boerne v. Flores, 521 U.S. 507 (1997) 16

Clark v. California, 123 F.3d 1267 (9th Cir. 1997) 13, 14

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) 16

Dare v. California, 191 F.3d 1167 (9th Cir. 1999), *cert. denied*, 531 U.S. 1190 (2001) 13, 14

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) 16

Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn, 280 F.3d 98 (2d Cir. 2001) 13, 18

Hason v. Medical Bd. of Cal., 279 F.3d 1167 (9th Cir.), *cert. granted in part*, 123 S. Ct. 561 (2002), *cert. dismissed*, 123 S. Ct. 1779 (2003) 9, 10, 13, 14

Kiman v. New Hampshire Dep't of Corrections, 301 F.3d 13 (1st Cir. 2002) 10

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) 16

Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998) 8

TABLE OF AUTHORITIES – Continued

Page

Popovich v. Cuyahoga County Court of Common Pleas, 227 F.3d 627 (6th Cir.), *rehearing en banc granted, opinion vacated* (6th Cir. 2000), *on rehearing en banc*, 276 F.3d 808 (6th Cir.), *cert. denied*, 123 S. Ct. 72 (2002) 6, 7, 15, 17, 18

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, 506 U.S. 139 (1993) 18

Reickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001) 11

Thompson v. Colorado, 278 F.3d 1020 (10th Cir. 2001), *cert. denied*, 535 U.S. 1077 (2002) 11, 12

Walker v. Snyder, 213 F.3d 344 (7th Cir. 2000), *cert. denied sub nom. United States v. Snyder*, 531 U.S. 1190 (2001) 12

Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002) 11, 18

Wroncy v. Oregon Dep't of Transp., 9 Fed. Appx. 604 (9th Cir. 2001) 14

Ex parte Young, 209 U.S. 123 (1908) 12

DOCKETED CASES

Bowers, etc. v. National Collegiate Athletic Ass'n, etc., et al., (3d Cir. Nos. 01-4226/4492 & 02-1789) 10-11

Johnson v. State Technology Ctr. at Memphis, (6th Cir. No. 98-6475) 5

Nihiser v. Ohio Envtl. Protection Agency, (6th Cir. No. 97-3933) 5

Parr v. Middle Tenn. State Univ., (6th Cir. No. 98-6701) 5

TABLE OF AUTHORITIES – Continued

Page

Pomeroy v. Western Mich. Univ., (6th Cir. No. 97-1751)..... 5

Satterfield v. Tennessee, (6th Cir. No. 98-5765)..... 5

Wright v. Lima Correctional Inst., (6th Cir. No. 97-3587)..... 5

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XI .....*passim*

U.S. CONST. amend. XIV .....*passim*

FEDERAL STATUTES, RULES AND REGULATIONS

28 U.S.C. § 1254(1) 1

42 U.S.C. § 12131.....1, 3

42 U.S.C. § 12132..... 3

28 C.F.R. Part 35.101..... 3

FED. R. CIV. P. 23 4

OTHER AUTHORITY

Brief for the United States in Opposition, *Thompson v. Colorado*, *cert. denied*, 535 U.S. 1077 (2002) (No. 01-1024).....9, 10

PETITION FOR A WRIT OF CERTIORARI

The Attorney General and Reporter of Tennessee, on behalf of the State of Tennessee, respectfully petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit that the State of Tennessee does not enjoy Eleventh Amendment immunity from claims by private individuals under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131, *et seq.*, if the claim purports to arise from a due process-type violation.

OPINIONS BELOW

The amended opinion of the court of appeals (App. 1-5) is reported at 315 F.3d 680 (6th Cir. 2003). The original opinion of the court of appeals (App. 10-11) and the order of the district court denying petitioner's motion to dismiss (App. 6-7) are unreported.

JURISDICTION

The initial judgment of the court of appeals was entered on July 16, 2002. A timely petition for rehearing was filed on August 29, 2002. The petition for rehearing was granted, and an amended opinion was entered on January 10, 2003. On March 4, 2003, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including May 12, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eleventh Amendment of the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. CONST. amend. XI.

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . .
>
> Section 5. The congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV.

Title II of the Americans with Disabilities Act of 1990 provides in pertinent part:

> (1) Public entity
>
> The term "public entity" means –
>
> (A) any State or local government;
>
> (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; . . .

42 U.S.C. § 12131.

Title II further provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

STATEMENT OF THE CASE

Respondents George Lane and Beverly Jones filed this suit in the United States District Court for the Middle District of Tennessee against the State of Tennessee and twenty-five Tennessee counties on August 10, 1998. The Complaint alleged that Defendants have violated Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12131, *et seq.*, and its regulations, 28 C.F.R. Part 35.101, *et seq.*, as more fully described below. (App. 12-28).

Respondent Lane alleged that he was denied access to the General Sessions Courts of Polk County when he was a defendant in a criminal action. (App. 15-17). Respondent Jones, a certified court reporter, alleged that she has been

denied access to the courthouses in Trousdale, Jackson, Clay and Pickett Counties for the purposes of transcribing trials and other matters and has lost work as a court reporter and the opportunity to participate in the judicial process. (App. 19-20). Respondents contended that the State of Tennessee administers its judicial functions in the county courthouses of each county of the state and that it has failed to comply with the Department of Justice regulations under the ADA found at 28 C.F.R. Part 35. (App. 20). Both respondents alleged that they have each been excluded from participation in the services offered by the county courthouses and denied equal access to the court proceedings of the State of Tennessee. (App. 23). Respondents also requested that the district court certify this case as a class action and certify them as class representatives pursuant to Rule 23, FED. R. CIV. P., on behalf of all individuals residing in the State of Tennessee who are qualified individuals with a physical disability that prevents them from climbing stairs or walking up steep inclines in the courthouses of the named defendants. (App. 25-26). Respondent Lane sought monetary damages for humiliation and embarrassment in an amount not to exceed $100,000. (App. 27). Respondent Jones sought monetary damages for humiliation and embarrassment and lost income in an amount not to exceed $250,000. *Id.* Respondents also requested that the district court compel the State of Tennessee and the counties to comply with the provisions of the ADA. (App. 28). Finally, respondents sought monetary damages for themselves as class representatives of the putative class they seek to represent and for each class member for humiliation and embarrassment. *Id.*

The State of Tennessee moved to dismiss the claims against it on the ground that Eleventh Amendment sovereign immunity protects it from suits for money damages under Title II of the ADA. By order entered November 10, 1998, the district court denied the motion without comment (App. 6-7), and the State of Tennessee immediately appealed that order to the Sixth Circuit Court of Appeals.

On motion of the State, the matter was consolidated for submission with two other cases pending before the Sixth Circuit. *Johnson v. State Technology Ctr. at Memphis* (6th Cir. No. 98-6475) and *Parr v. Middle Tenn. State Univ.* (6th Cir. No. 98-6701). Oral argument in the consolidated cases was further consolidated for argument with four other cases.[1] The cases were collectively heard by the Sixth Circuit on October 26, 1999, at which time the panel took them under advisement. On April 17, 2000, this Court granted review in *Board of Trustees of the University of Alabama v. Garrett*, on the issues of whether Title I and Title II of the ADA are valid exercises of Congress's authority to abrogate the states' sovereign immunity. 529 U.S. 1065 (2000).

On April 28, 2000, the Sixth Circuit panel issued an order holding the cases in abeyance pending this Court's decision in *Garrett*. On September 18, 2000, before this Court's decision in *Garrett*, another panel of the Sixth

---

[1] *Satterfield v. Tennessee* (6th Cir. No. 98-5765); *Nihiser v. Ohio Envtl. Protection Agency* (6th Cir. No. 97-3933); *Wright v. Lima Correctional Inst.* (6th Cir. No. 97-3587); and *Pomeroy v. Western Mich. Univ.* (6th Cir. No. 97-1751).

Circuit issued its opinion in another pending case presenting the issue of the states' Eleventh Amendment immunity from suit under Title II of the ADA. *Popovich v. Cuyahoga County Court of Common Pleas*, 227 F.3d 627 (6th Cir.), *rehearing en banc granted, opinion vacated* (6th Cir. 2000), *on rehearing en banc*, 276 F.3d 808 (6th Cir.), *cert. denied*, 123 S. Ct. 72 (2002). The original *Popovich* panel held that the plaintiff's Title II claim in that case was barred by Eleventh Amendment immunity. 227 F.3d at 641.

This Court heard oral argument in *Garrett* on October 11, 2000, and issued its opinion on February 21, 2001. The Sixth Circuit granted rehearing en banc in *Popovich* on December 12, 2000, but delayed rehearing pending this Court's decision in *Garrett*.

The en banc court of appeals issued its opinion in *Popovich* on January 10, 2002. A sharply divided court agreed in part with the original panel, holding that "[i]t is clear after *Garrett* that congressional authority under section 5 to enforce the Equal Protection Clause is limited and will not sustain the Disabilities Act as an exception to Eleventh Amendment state immunity." 276 F.3d at 812. The majority, however, distinguished between Title II claims sounding in equal protection and those sounding in due process, concluding that the latter are not barred by the Eleventh Amendment. *Id.* at 813-16.

After the en banc decision in *Popovich* was issued, the panel before whom this case was pending issued a per curiam order affirming the district court's denial of the State's motion to dismiss. Concluding, based on *Popovich*, "that the Eleventh Amendment does not bar Title II claims against state entities that are based upon Fourteenth

Amendment due process principles," the panel determined that respondents' Title II claims were not barred "[b]ecause . . . [they are] based on such due process principles." (App. 11).

On August 29, 2002, the State petitioned for a panel rehearing, arguing that *Popovich* was not controlling because the Complaint, properly analyzed, did not allege due process violations. The petition was granted on September 20, 2002, and the court directed both parties to submit briefs on the issue of whether respondents' claims were based on due process principles. (App. 8). On January 10, 2003, the panel issued an amended opinion affirming the decision of the district court and remanding the case for further proceedings. (App. 1-5). Noting that "[a]mong the rights protected by the Due Process Clause of the Fourteenth Amendment is the right of access to the courts" (App. 3), the court, without citation to authority, asserted that "[t]he evidence before Congress when it enacted Title II of the [ADA] established that physical barriers in government buildings, including courthouses and in the courtrooms themselves, have had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause" (App. 3-4), and that Congress enacted Title II as an appropriate means "'to guarantee meaningful enforcement' of the constitutional rights of the disabled," including "the right of access to the courts." (App. 4, quoting *Popovich*, 276 F.3d at 815-16).

Turning to the allegations of the Complaint, the panel concluded that both respondents were seeking to redress due process-type violations of Title II: "Jones and Lane are seeking to vindicate their right of access to the courts in Tennessee. Lane alleges that he has been denied the

benefit of access to the courts. Jones similarly alleges that she has been excluded from courthouses and court proceedings by an inability to access the physical facilities." (App. 5). The court declined to answer the State's contention that respondents' allegations, particularly those made by Jones, were based upon equal protection principles. *Id.* "The difficult questions presented by this case cannot be clarified absent a factual record," the court observed. *Id.* And, because the case came to the Sixth Circuit "before any development of the facts," a remand to the district court for further proceedings was deemed appropriate. *Id.*

On the State's motion, the court of appeals stayed the mandate pending the filing and disposition of this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

This Court has granted certiorari three times on the first question presented by this petition.[2] Each time the issue has been taken up by this Court, it has evaded review. Once again, this petition squarely raises the issue and the State of Tennessee urges this Court to grant the petition and resolve the issue of the states' Eleventh

[2] In 1998, in determining whether inmates in state prisons were covered by Title II, this Court held that state prisons fall within the definition of "public entity." *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998). However, the Court expressly declined to resolve the issue of "whether application of the ADA to state prisons is a constitutional exercise of Congress' power under . . . , § 5 of the Fourteenth Amendment" because it had not been addressed by the Court of Appeals. *Id.* at 212.

Amendment immunity from suits for money damages brought by private individuals under Title II of the ADA.

In 2000, this Court agreed to review the Eighth Circuit's en banc decision holding that Congress had not validly abrogated the states' Eleventh Amendment immunity with Title II of the ADA. *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (*en banc*), *cert. granted*, 528 U.S. 1146, *cert. dismissed*, 529 U.S. 1001 (2000). However, certiorari was dismissed by agreement of the parties.

Then, this Court granted certiorari in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), to decide whether state employees can bring a private action against their employer under Title I and/or Title II of the ADA. However, after argument, the Court determined that the parties had not addressed the issue of whether state employees can sue under Title II and dismissed the Title II portion of the writ as improvidently granted. *Id.* at 360 n.1.

Most recently, this Court granted review in *Medical Board of California v. Hason* on the question whether the "Eleventh Amendment bar[s] suit under Title II of the ADA against the California Medical Board for denial of a medical license based on the applicant's mental illness." 123 S. Ct. 561 (2002). However, that petition was dismissed on the motion of the State of California. 123 S. Ct. 1779 (2003).

This case presents yet another opportunity for the Court to decide the question whether the states enjoy Eleventh Amendment immunity from suits for money damages brought by private individuals under Title II of the ADA. Previously, the United States has acknowledged that this issue "is an important question that may merit

review by this Court at the appropriate time and in the appropriate case." Brief for the United States in Opposition at 6, *Thompson v. Colorado*, *cert. denied*, 122 S. Ct. 1960 (2002) (No. 01-1024) (footnote omitted). As we now show, the need for this Court's authoritative guidance concerning this important issue of constitutional law has not abated since the recent dismissal in *Hason*, and this is the appropriate time and case for review by this Court.

I. There Is a Clear Split among the Circuits Concerning Whether, under Title II of the ADA, Congress Has Validly Abrogated State Sovereign Immunity under the Eleventh Amendment.

This Court should grant review in order to settle the disagreement among the lower courts concerning whether Congress validly abrogated the states' Eleventh Amendment immunity in enacting Title II of the Americans with Disabilities Act. After this Court's decision in *Garrett*, holding that the states are immune from suits for money damages under Title I of the ADA, the lower circuit courts have struggled to address Title II in relation to the Eleventh Amendment. Currently, there is a four-way circuit split.[3] While the majority of the circuits have held that the

[3] The First and Third Circuits have not addressed the issue but will do so shortly. In *Kiman v. New Hampshire Dep't of Corrections*, 301 F.3d 13 (1st Cir. 2002), a panel of the First Circuit held that an individual plaintiff could bring an action under Title II only as Title II "is applied to cases in which a court identified a constitutional violation by the state." *Id.* at 24. However, that opinion was vacated because the First Circuit has granted rehearing en banc. Oral argument is set for June 5, 2003. In addition, this issue has been briefed and is set to be argued before the Third Circuit during the week of July 7, 2003, in

(Continued on following page)

states have sovereign immunity from claims for monetary damages under Title II, the Sixth Circuit has joined the Second Circuit in holding that Title II plaintiffs may overcome state immunity in certain factual circumstances, while the Ninth Circuit simply allows all claims against public entities.

The five circuits holding that the states have immunity from claims under Title II have addressed the issue in similar fashion. The Fourth Circuit held "that Congress did not have an adequate record of unconstitutional discrimination by states against the disabled to support abrogation." *Wessel v. Glendening*, 306 F.3d 203, 213 (4th Cir. 2002). Thus, the Fourth Circuit concluded "that Congress did not validly abrogate the sovereign immunity of the states when it enacted Part A of Title II of the ADA." *Id.* at 215. The Fifth Circuit also held that Congress "has not validly acted through its Fourteenth Amendment Section 5 power to abrogate state sovereign immunity" under Title II of the ADA. *Reickenbacker v. Foster*, 274 F.3d 974, 984 (5th Cir. 2001).

The Tenth Circuit directly considered the plaintiffs' claim that the ADA enforces both the Equal Protection Clause and the Due Process Clause in *Thompson v. Colorado*, 278 F.3d 1020 (10th Cir. 2001), *cert. denied*, 535 U.S. 1077 (2002). The Tenth Circuit held that it could not "conclude that Congress 'identified a history and pattern' of unconstitutional discrimination by the states against the disabled . . . or extensive litigation and discussion of

Bowers, etc. v. National Collegiate Athletic Ass'n, etc., et al. (3d Cir. Nos. 01-4226/4492 & 02-1789).

the constitutional violations." *Id.* at 1034. Thus, the Tenth Circuit held that Title II is not "preventive or remedial legislation that is congruent and proportional to any constitutional violation." *Id.* In the Tenth Circuit, therefore, Title II ADA claims under either the Equal Protection or Due Process Clauses are explicitly barred.

Before this Court's decision in *Garrett*, the Seventh Circuit issued *Walker v. Snyder*, 213 F.3d 344 (7th Cir. 2000), *cert. denied sub nom. United States v. Snyder*, 531 U.S. 1190 (2001), which appears to hold that claims for reasonable modifications under Title II of the ADA are barred. *Walker* also held that *Ex parte Young*, 209 U.S. 123 (1908), did not authorize suits for injunctive relief against state officials under Title II of the ADA. The Seventh Circuit later determined that the latter holding was overruled by *Garrett*. *See Bruggeman v. Blagojevich*, 324 F.3d 906, 912-13 (7th Cir. 2003). However, *Walker's* holding barring monetary claims against the States appears to remain good law.

Also before this Court's decision in *Garrett*, the Eighth Circuit held in *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1010 (8th Cir. 1999) (*en banc*), *cert. granted*, 528 U.S. 1146, *cert. dismissed*, 529 U.S. 1001 (2000), "that the extension of Title II of the ADA to the states was not a proper exercise of Congress's power under section 5 of the Fourteenth Amendment. Consequently, there is no valid abrogation of Arkansas' Eleventh Amendment immunity from private suit in federal court and the district court lacked subject matter jurisdiction over the ADA claim."

Contrary to the well-reasoned opinions in the above circuits, the Second, Sixth and Ninth Circuits have failed to apply *Garrett* to cases brought by private plaintiffs

against state entities under Title II. The Second Circuit held that certain factual patterns will allow a plaintiff to defeat state immunity and bring an action for money damages against a state. *Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn*, 280 F.3d 98 (2d Cir. 2001). The Second Circuit focused on Title II's remedial scheme. *Id.* at 111. Unlike Title I, which incorporates the remedial scheme of Title VII, Title II of the ADA incorporates the remedial scheme found in the Rehabilitation Act, which incorporates Title VI's remedial scheme and which has only a judicially implied private cause of action. *Id.* The Second Circuit held that it had the latitude, indeed was required, to shape a remedial scheme that would comply with Congress's constitutional authority. *Id.* Thus, in the Second Circuit, private individuals may sue an unconsenting state for violation of Title II if "the plaintiff can establish that the Title II violation was motivated by either discriminatory animus or ill will due to disability." *Id.* at 112. "[A] plaintiff may rely on a burden-shifting technique similar to that adopted in *McDonnell Douglas Corp. v. Green* or a motivating-factor analysis similar to that set out in *Price Waterhouse v. Hopkins*." *Id.* (citations omitted).

The Ninth Circuit stands in complete opposition to the other circuits. Before *Garrett*, the Ninth Circuit held that Title II of the ADA is a valid abrogation by Congress of the states' Eleventh Amendment immunity. *Dare v. California*, 191 F.3d 1167, 1173-74 (9th Cir. 1999), *cert. denied*, 531 U.S. 1190 (2001); *Clark v. California*, 123 F.3d 1267, 1270-71 (9th Cir. 1997). In more recent decisions, the Ninth Circuit has specifically declined to reexamine Title II under the analysis required by this Court in *Garrett* and continues to apply its pre-*Garrett* holdings to Title II. *Hason v. Medical Bd. of Cal.*, 279 F.3d 1167, 1171 (9th

Cir.), *cert. granted in part*, 123 S. Ct. 561 (2002), *cert. dismissed*, 123 S. Ct. 1779 (2003). "[W]e . . . conclude that *Garrett* does not overrule either *Clark* or *Dare*, and that the Eleventh Amendment does not bar . . . Title II claims." *Id.* at 1172. Thus, in the Ninth Circuit, private individuals may bring claims for monetary damages against the states. Indeed, the Ninth Circuit has held that Title II "brings within its scope anything a public entity does." *Wroncy v. Oregon Dep't of Transp.*, 9 Fed. Appx. 604, 606 (9th Cir. 2001) (citations omitted).

Thus, in the Fourth, Fifth, Seventh, Eighth, and Tenth Circuits, the states are immune from claims for monetary damages brought by private individuals under Title II of the ADA. However, in the Sixth Circuit, the states have immunity only in cases alleging an equal protection-type violation and in the Second Circuit, the states are protected only if the plaintiff does not allege actual intent to discriminate. Finally, in the Ninth Circuit, the states are completely unprotected from private claims for monetary damages under Title II.

Clearly, there is a substantial split among the lower courts warranting this Court's intervention. As a result of this split, the extent of Eleventh Amendment immunity enjoyed by a state depends completely upon the circuit in which it is located. Plaintiffs and states alike have no certainty so long as this important issue remains unresolved. The variety of approaches used by the circuits adds to the confusion. Only this Court can finally settle the matter.

II. The Sixth Circuit's "As-Applied" Analysis Announced in *Popovich* and Employed in This Case Conflicts with This Court's Decisions Delimiting Congress's Section 5 Authority to Abrogate Eleventh Amendment Immunity.

In this case, the Sixth Circuit applied its holding in *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir.) (*en banc*), *cert. denied*, 123 S. Ct. 72 (2002), to conclude that the State of Tennessee does not have Eleventh Amendment immunity from a potential class action[4] by mobility-impaired persons seeking physical access to the county courthouses in Tennessee. The Sixth Circuit's analysis in *Popovich* and applied in this case is fatally flawed.

In *Board of Trustees of the University of Alabama v. Garrett*, this Court held that Congress exceeded its power under the Fourteenth Amendment in abrogating the states' Eleventh Amendment immunity from suits brought under Title I of the ADA, concerning employment. 531 U.S. at 374. The Court found that Title I did not fall under Congress's power to enforce constitutional rights, as Title I created rights and remedies far beyond what the Constitution requires, and Congress was not responding to a pattern of previous constitutional violations by the states. *Id.*

In *Garrett*, this Court accurately describes its section 5 analysis as a set of "now familiar principles." *Id.* at 365.

---

[4] Although Plaintiffs moved for class certification in their Complaint, the district court has not yet ruled on the issue. That issue, like all others in this case, was stayed while the State of Tennessee pursues this appeal.

There are several steps required to determine whether a given enactment is justified by Congress's power under section 5 of the Fourteenth Amendment, to enforce constitutional guarantees. First, the Court "identif[ies] with some precision the scope of the constitutional right at issue." *Id.* Second, the Court "examine[s] whether Congress identified a history and pattern of unconstitutional" state action in the area in question (such as employment discrimination against the disabled), because Congress's section 5 power "is appropriately exercised only in response to state transgressions." *Id.* at 368. Third, whether the alleged "pattern" of State misbehavior seems great or small, the Court compares Congress's statutory remedial scheme to the constitutional problem it addresses in order to determine if it is "congruent and proportional." *Id.* at 374.

In an unbroken line of cases, this Court has applied the congruence and proportionality test in examining whether Congress exceeded its powers under section 5 of the Fourteenth Amendment in abrogating the states' Eleventh Amendment immunity. *See id.* at 360 (ADA Title I); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (Patent Remedy Act); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (Trademark Remedy Clarification Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Religious Freedom Restoration Act). In each of these cases, this Court held that the statute in question was not a valid exercise of Congress's section 5 enforcement power, because Congress was not responding to a pattern of state

constitutional violations, and each statute granted rights and remedies beyond what the Constitution requires.

In doing so, this Court reviewed and rejected each challenged statute on its face, not in an "as-applied" context such as the approach utilized by the Sixth Circuit. This Court has never looked to any individual claim or measured any particular plaintiff's claim against the relevant constitutional guarantee. Title II should be subject to the same form of analysis performed by this Court in *Garrett*.

In *Garrett*, for example, this Court compared Title I's *statutory provisions* to the Constitution's equal protection guarantees – it did not compare Ms. Garrett's specific allegations to the constitutional standard. *Garrett*, 531 U.S. at 365-68. In contrast, the Sixth Circuit addressing Title II stated, "[i]n defining the 'metes and bounds' of the constitutional right before us, we must consider whether plaintiff's due process-type claim to participate fully in the hearing in his child custody suit is an exception to Eleventh Amendment immunity." *Popovich*, 276 F.3d at 813. Similarly, applying *Popovich* to the instant case, the Sixth Circuit determined that respondents may be able to sue the State of Tennessee under Title II, because their particular claims implicate a due process "right of access to the courts." (App. 5). The Sixth Circuit has now remanded the case to the district court for further factual development to test that hypothesis. *Id.* The end result of the Sixth Circuit's analysis in this case is that respondents' specific factual allegations will determine whether Congress validly abrogated Tennessee's Eleventh Amendment immunity when it enacted Title II of the ADA. This does not comply with *Garrett*.

Moreover, the very process of additional fact-finding envisioned by the Sixth Circuit's amended order remanding this case to the district court will irretrievably strip Tennessee of most of the protections the Eleventh Amendment was intended to secure, *i.e.*, immunity from suit, not simply immunity from liability. This Court has long recognized that the states' Eleventh Amendment immunity is immunity not just from liability but from suit itself. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 146-47 (1993) and cases cited therein.

The lack of an adequate legislative history to support the viability of Title II of the ADA is apparent. Had the Sixth Circuit followed this Court's guidance in *Garrett*, it would have been constrained to reach the conclusion that respondents may not sue Tennessee. Title II is grounded on the same provisions and legislative history that this Court found inadequate to support abrogation in *Garrett*. *See Wessel*, 306 F.3d at 213; *Alsbrook*, 184 F.3d at 1009.

As discussed above, the Second Circuit's analysis of Title II of the ADA in *Garcia* suffers from some of the same problems as the Sixth Circuit's *Popovich* analysis. Thus, the harms of the as-applied approach are not confined to the Sixth Circuit. For this reason, this Court should not only resolve the four-way split over the states' Eleventh Amendment immunity under Title II of the ADA, but should also resolve whether section 5 analysis should ever take this as-applied form.

This Court should take this opportunity to finally resolve the issue of whether the states have Eleventh Amendment immunity from suits for money damages brought by private individuals under Title II of the ADA.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General & Reporter
State of Tennessee

MICHAEL E. MOORE*
Solicitor General

S. ELIZABETH MARTIN
Senior Counsel
MARY MARTELLE COLLIER
Assistant Attorney General
Civil Litigation & State Services Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-2471

Attorneys for Petitioner
**Counsel of Record*

Dated: May 12, 2003

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
ELECTRONIC CITATION: 2003 FED App. 0010A (6th Cir.)
File Name: 03a0010a.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE LANE; BEVERLY JONES
Plaintiffs-Appellees,
UNITED STATES OF AMERICA,
Intervenor,
v.
STATE OF TENNESSEE,
Defendant-Appellant,
POLK COUNTY, TENNESSEE, et al.,
Defendants.

No. 98-6730

On Petition for Rehearing of an
Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 98-00731—Thomas A. Higgins, District Judge.

Decided and Filed: January 10, 2003

Before: MARTIN, Chief Circuit Judge;
SUHRHEINRICH and SILER, Circuit Judges.

COUNSEL

ON BRIEF: Mary M. Collier, S. Elizabeth Martin, OFFICE OF THE ATTORNEY GENERAL, CIVIL LITIGATION & STAFF [sic] SERVICES DIV., Nashville, Tennessee, for Appellant, William J. Brown, WILLIAM J. BROWN & ASSOCIATES, Cleveland, Tennessee, for Appellees. Seth M. Galanter, Sarah E. Harrington, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, Washington, D.C., for Intervenor.

AMENDED OPINION

BOYCE F. MARTIN, JR., Chief Circuit Judge. This Court initially issued an opinion in this case on July 16, 2002. We held that Lane and Jones stated claims founded in due process violations, and, under *Popovich v. Cuyahoga County Court of Common Pleas,* 276 F.3d 808 (6th Cir. 2002) (en banc) *cert. denied,* 123 S.Ct. 72 (October 7, 2002), Tennessee and the other state defendants were not immune from Lane and Jones's damages claims under Title II of the Americans with Disabilities Act. On September 20, we granted the State of Tennessee's motion for panel rehearing. All parties submitted supplemental briefs. Tennessee argued that Lane and Jones's claims are not based on due process violations and that Tennessee therefore enjoys Eleventh Amendment immunity from suit on those claims. On rehearing and for the following reasons, we AFFIRM the district court's denial of Tennessee's motion to dismiss and REMAND this case for further proceedings.

In *Popovich,* we considered the validity of the abrogation of a state's immunity to suit by private parties under Title II of the Americans with Disabilities Act. Guiding our hand through our evaluation was the Supreme Court's recent decision in *University of Alabama v. Garrett,* 531 U.S. 356 (2001), in which the Supreme Court affirmed that Section Five of the Fourteenth Amendment grants Congress the power to abrogate the Eleventh Amendment immunity of the states to private damage suits. We held that the Eleventh Amendment barred claims under Title II of the Americans with Disabilities Act based on equal protection violations but Congress could abrogate Eleventh Amendment immunity as to due process claims.

Among the rights protected by the Due Process Clause of the Fourteenth Amendment is the right of access to the courts. For criminal defendants like Lane, the Due Process Clause has been interpreted to provide that "an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta v. California,* 422 U.S. 806, 819 n.15 (1975). Parties in civil litigation have an analogous due process right to be present in the courtroom and to meaningfully participate in the process unless their exclusion furthers important governmental interests. *See Popovich,* 276 F.3d at 813-14; *Helminski v. Ayerst Labs.,* 766 F.2d 208, 213 (6th Cir.), *cert. denied,* 474 U.S. 981 (1985). Further, those who fail to appear in court may not be sanctioned for failing to appear until they have been accorded due process. *Groppi v. Leslie,* 404 U.S. 496, 502 (1972). These guarantees are protective of equal justice and fair treatment before the courts.

The evidence before Congress when it enacted Title II of the Americans with Disabilities Act established that

physical barriers in government buildings, including courthouses and in the courtrooms themselves, have had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause. In *Popovich,* we found that Title II was enacted "to guarantee meaningful enforcement" of the constitutional rights of the disabled. 276 F.3d at 815-16. In doing so, Congress may require states to consider the nature of the constitutional right at issue, the often relatively small cost of compliance, and the effect of failure to accommodate those with disabilities. In the context of the case before us, Congress could ask states to weigh the fundamental importance of access to the courts to our justice system, that the perpetuation of the current physical barriers force people with disabilities to either forgo their right to be present in court or be carried into court, and that the remedy is often inexpensive and simple.

Based on the record before Congress in considering the Americans with Disabilities legislation, it was reasonable for Congress to conclude that it needed to enact legislation to prevent states from unduly burdening constitutional rights, including the right of access to the courts. States have myriad ways to unburden these rights, from the major step of renovating facilities to the relatively minor step of assigning aides to assist in access to the facilities. The record demonstrated that public entities' failure to accommodate the needs of qualified persons with disabilities may result directly from unconstitutional animus and impermissible stereotypes. Title II ensures that the refusal to accommodate an individual with a disability is genuinely based on unreasonable cost or

actual inability to accommodate, not on inconvenience or unfounded concerns about costs.

This statutory protection is a preventive measure commensurate to the gravity of precluding access to the courts by those with disabilities. In addition, these requirements are carefully tailored to the unique features of disability discrimination that persists in public services. A simple ban on discrimination against those with disabilities lacks teeth. The continuing legacy of discrimination is too powerful. Title II affirmatively promotes integration of those with disabilities.

Jones and Lane are seeking to vindicate their right of access to the courts in Tennessee. Lane alleges that he has been denied the benefit of access to the courts. Jones similarly alleges that she has been excluded from courthouses and court proceedings by an inability to access the physical facilities. Tennessee responds that the violations alleged are not due process violations. The difficult questions presented by this case cannot be clarified absent a factual record. Because in *Popovich* we held that Title II is an appropriate means of enforcing the due process rights of individuals, and because this case came to us before any development of the facts, we hold that the district court appropriately denied Tennessee's motion to dismiss this action.

We AFFIRM the decision of the district court and REMAND for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

GEORGE LANE and BEVERLY JONES,	)	
Plaintiffs,	)	No. 3:98 CV 0731
v.	)	Judge Higgins
STATE OF TENNESSEE, and its political subdivisions, POLK COUNTY, BLEDSOE COUNTY, CANNON COUNTY, CHESTER COUNTY, COCKE COUNTY, DECATUR COUNTY, FAYETTE COUNTY, GRAINGER COUNTY, HANCOCK COUNTY, HAWKINS COUNTY, HICKMAN COUNTY, HOUSTON COUNTY, JACKSON COUNTY, LAKE COUNTY, LEWIS COUNTY, MEIGS COUNTY, MOORE COUNTY, PERRY COUNTY, PICKETT COUNTY, TROUSDALE COUNTY, and VAN BUREN COUNTY,	)	Magistrate Griffin
Defendants.	)	

DEFENDANT STATE OF TENNESSEE'S MOTION TO DISMISS

(Filed Oct. 5, 1998)

Defendant, State of Tennessee, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, moves this Court to dismiss the claims against Defendant State of

Tennessee. Plaintiff's claims under the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*, its regulations, 28 C.F.R. 35.10 *et seq.* and the Rehabilitation Act, 29 U.S.C. § 794a are barred by the Eleventh Amendment to the United States Constitution. Congress did not have the constitutional authority to make either the ADA or the Rehabilitation Act applicable to the states.

* * *

This document was entered on the docket in compliance with Rule 58 and/or Rule 79(a), FRCP, on 11-12-98
By /s/ TLC.

[Order
Motion denied
/s/ Thomas A. Higgins
USDJ/11-10-98]

No. 98-6730

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE LANE, et al, Plaintiffs-Appellees	)	
UNITED STATES OF AMERICA, Intervenor	)	ORDER
v.	)	(Filed Sep. 20, 2002)
STATE OF TENNESSEE, Defendant-Appellant	)	
POLK COUNTY, et al., Defendants	)	

Before: MARTIN, Chief Circuit Judge; SUHRHEINRICH and SILER, Circuit Judges

Upon the petition of the appellant State of Tennessee for panel rehearing of the court's decision in the appeal noted above, and the court having found the petition to be well taken; it is

ORDERED that the petition for rehearing is hereby GRANTED. The opinion and judgment of July 16, 2002 are hereby withdrawn, and the case is restored to the court's active docket. The parties are further instructed to file briefs not in excess of 25 pages addressing the issue as outlined in the petition for rehearing, with each side's brief to be filed not later than the close of business on Wednesday, October 23, 2002. Upon the filing of the briefs the court will proceed to dispose of the case.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green
Leonard Green, Clerk

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

No. 98-6730

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE LANE and
BEVERLY JONES,

Plaintiffs-Appellees,

v.

STATE OF TENNESSEE,
et al.,

Defendants-Appellants.

ON APPEAL FROM THE
UNITED STATES
DISTRICT COURT FOR
THE MIDDLE DISTRICT
OF TENNESSEE

NOT RECOMMENDED
FOR FULL-TEXT
PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be *prominently* displayed if this decision is reproduced.

(Filed Jul. 16, 2002)

BEFORE: MARTIN, Chief Circuit Judge, SUHRHEINRICH and SILER, Circuit Judges

PER CURIAM. Plaintiffs are paraplegics who sued the State of Tennessee under Title II of the Americans with Disabilities Act because they were unable to access the second floors of many county courthouses in the state.

Tennessee filed a motion to dismiss, claiming Eleventh Amendment Immunity. The district court denied the motion and Tennessee appealed.

In *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 816-18 (6th Cir. 2002), this court held that the Eleventh Amendment does not bar Title II claims against state entities that are based on Fourteenth Amendment due process principles. *See also Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). Because plaintiffs' Title II claim is based on such due process principles, we AFFIRM the district court's denial of Tennessee's motion to dismiss and REMAND this case for further proceedings consistent with *Popovich*.

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

GEORGE LANE and BEVERLY JONES	)	
Plaintiffs	)	No. _____ 3 98-0731
v.	)	
STATE OF TENNESSEE, and its political subdivisions, POLK COUNTY, BLEDSOE COUNTY, CANNON COUNTY, CHESTER COUNTY, CLAIBORNE COUNTY, COCKE COUNTY, DECATUR COUNTY, FAYETTE COUNTY, GRAINGER COUNTY, HANCOCK COUNTY, HAWKINS COUNTY, HICKMAN COUNTY, HOUSTON COUNTY, JACKSON COUNTY, JEFFERSON COUNTY, JOHNSON COUNTY, LAKE COUNTY, LEWIS COUNTY, MEIGS COUNTY, MOORE COUNTY, PERRY COUNTY, PICKETT COUNTY, TROUSDALE COUNTY, and VAN BUREN COUNTY	)	JUDGE HIGGINS
Defendants.	)	

COMPLAINT

(Filed Aug. 10, 1998)

Comes the plaintiffs, George Lane and Beverly Jones, by and through counsel, who would hereby sue the defendants noted above and for cause would show as follows:

I.

PARTIES

(a) The Plaintiff George Lane: The plaintiff Lane is a citizen and resident of Polk County, Tennessee. He is a qualified individual with a disability as is defined by 42 U.S.C. 12131(2) in that he is a paraplegic and is and has been in need of the services of the judicial division of the State of Tennessee and its political subdivisions. It is hereby requested that he be allowed to serve as a class representative for all qualified individuals with a disability needing the services of the judicial division of the State of Tennessee and its political subdivisions.

(b) The Plaintiff Beverly Jones: The plaintiff Jones is a citizen and resident of Macon County, Tennessee and resides at 143 Carter Circle, Woodland Estates, Lafayette, Tennessee. She is a qualified individual with a disability as is defined by 42 U.S.C. 12131(2) in that she is a paraplegic and confined to a wheelchair. Plaintiff Jones is a certified court reporter who makes her living by attending judicial proceedings throughout the State of Tennessee and recording those proceedings on behalf of attorneys and parties that present their cases before the courts of this State. She is, and has been, in need of the services of the judicial division of the State of Tennessee and its political subdivisions for the purpose of supporting herself and her family by being allowed to attend court proceedings and transcribing those proceedings. It is hereby requested that she be allowed to serve as a class representative for all qualified individuals with a disability needing the services of the judicial division of the State of Tennessee and its political subdivisions.

(c) The Defendants: The State of Tennessee is a political subdivision of the United States of American and as such it and its political subdivisions are subject to the laws of the United States of America. They are specifically charged under the terms of the United States Constitution and the Tennessee Constitution with providing the service of courts and judicial proceedings and other manifestations of that process such as courtrooms, clerk's offices and public meeting rooms that are conducted in the courthouses of the State of Tennessee. Polk County, Bledsoe County, Cannon County, Chester County, Claiborne County, Clay County, Cocke County, Decatur County, Fayette County, Grainger County, Hancock County, Hawkins County, Hickman County, Jackson County, Jefferson County, Johnson County, Lake County, Lewis County, Meigs County, Moore County, Perry County, Pickett County, Trousdale County, and Van Buren County are all political subdivisions of the State of Tennessee and are required under the Constitution of the State of Tennessee to provide courthouses that provide services to all persons including citizens of this State and qualified individuals with disabilities as definded [sic] by 42 U.S.C. 12131. Don Sundquist is the chief executive officer of the State of Tennessee. Each of the named counties has an individual county executive upon whom service of process shall be provided.

II.

JURISDICTION

This court has jurisdiction over the matters contained in this complaint pursuant to the provisions of the Americans with Disability Act (ADA) 42 U.S.C. 12131 et seq., 29 U.S.C. 794a and 28 C.F.R. 35.101 et seq.

III.

PLAINTIFF LANE'S PROCEDURAL HISTORY

(a) That as noted above, the plaintiff, George Lane is a paraplegic and as such is a qualified individual with a disability as defined by 42 U.S.C. 12131(2).

(b) In May and September of 1996, the plaintiff Lane, hereinafter referred to as Lane, had two sets of criminal charges brought against him by law enforcement in Polk County, Tennessee in the name of the State of Tennessee and under the laws of the State of Tennessee. Lane was required by the orders of the court to appear at the Polk County Courthouse in Benton, Tennessee to answer the charges.

(c) All court proceedings and all clerk's offices that support the court systems of Polk County, Tennessee are conducted on the second floor of the courthouse. The only access to the courtrooms and courts, up until June of 1998, was by one of two staircases. Lane was required to crawl up two flights of stairs to get to the courtroom to meet the requirements of his appearance before the General Sessions Court for Polk County, Tennessee. Lane was arraigned and told to appear at a later date for his hearing. Lane appeared and, not desiring to go through the humiliation of crawling up the stairs again, waited on the first floor of the courthouse and sent word to the court that he would not crawl to the courtroom again. Lane also declined to be carried by officers to the courtroom. The court issued an attachment for his arrest, and he was arrested and taken to jail.

(d) Lane was later released from custody and retained counsel to represent him. Thereafter, Lane attended his

court proceedings by waiting downstairs from the courtroom and having his attorney shuttle back and forth with information concerning his case. During this time, Lane did not have an opportunity to view the court processes in any way because of his inability to get to the courtroom.

(e) On February 24, 1997, a preliminary hearing was held in the Courthouse library concerning his charges. This was done over his attorney's objections in that the proceedings were held [sic] a location that was not regularly frequented by the public. His case was bound over to the Polk County Grand Jury.

(f) On March 17, 1997, the Polk County Grand Jury reported two misdemeanor indictments against Lane. On that date Lane's counsel appeared on his behalf advising the court that Lane was on the first floor of the courthouse and could not come to the courtroom because of the requirement to climb the stairs to the courtroom. Counsel then requested the court to continue the arraignment until such time as the courthouse could be made to conform to the requirements of the Americans with Disability Act. The court declined, and without arraigning Lane, set the case for trial.

(g) On or about April 23, 1997, Lane's counsel filed an application for extraordinary appeal to the Tennessee Court of Criminal Appeals raising the issue of Lane's not being able to get to the courtroom and the fact that the courthouse did not accommodate handicapped individuals. The Attorney General for the State of Tennessee argued in his brief that this failure to provide services to Lane should be condoned and that Lane should be required to stand trial at the Polk County Courthouse despite his inability to get to the courtroom. This appeal was denied.

On or about June 24, 1997, Lane filed an application for extraordinary appeal to the Supreme Court of the State of Tennessee. Again, the Attorney General argued to the court that the court should ignore this violation of Lane's rights under the ADA. This appeal was likewise denied on or about September 2, 1997.

(h) On or about December 12, 1997, the Honorable Carroll Ross signed an order holding all criminal proceedings in abeyance until the completion of the construction of an elevator that would permit access to the courtrooms and clerk's offices in the Polk County Courthouse. The construction of this elevator was completed in June of 1998.

(i) Other than the proceeding where Lane crawled to the courtroom and his preliminary hearing in the library, he was unable to attend any court proceedings in the Polk County Courthouse until the installation of the elevator in June of 1998, and has been denied access to the services of the court that are conducted therein.

(j) That the Polk County Courthouse still fails to meet the requirements of the American's with Disabilities Act with reference to access to restroom facilities.

IV.

POLK COUNTY'S HISTORY CONCERNING THE AMERICANS WITH DISABILITY ACT

(a) That on January 26, 1992, regulations were established by the United States Department of Justice that made provisions for State and Local governments of the United States to meet the requirements of the ADA. These regulations were published by the Department of

Justice as 28 C.F.R. Part 35 pursuant to the provisions of 42 U.S.C. 12134. As a part of that regulation, all public entities were required to evaluate its services, policies and practices and the effects thereof and make modifications within one year of the effective date of the regulation. 28 C.F.R. 35.105.

(b) In October of 1992, the Polk County Commission had brought to its attention the requirement of the ADA and the commission appointed a review committee to review the facilities condition. In May of 1993, the ADA Committee for Polk County prepared a Self-Evaluation and analysis and transition plan. This plan specifically found that the county buildings did not conform to the requirements of the ADA. On October 20, 1994, the Polk County Commission specifically voted not to construct an elevator in the courthouse, despite the recommendations of the County ADA Committee.

(c) That Polk County has, as a matter of policy, refused to come into compliance with the ADA until such time as the plaintiff initiated a grievance procedure. This grievance was filed on October 31, 1996. A series of meeting were held with the Grievance Committee and before the Polk County Commission. However, it was not until November of 1997, that the Polk County Commission acted to authorize the construction of an elevator to meet the requirements of the ADA. All the while the plaintiff was compelled to present his defense against these violations in court. While Polk County has constructed an elevator, it still fails to have its courthouse comply with the requirement of the ADA.

(d) Throughout these proceedings, the plaintiff has suffered extreme humiliation and embarrassment, as well

as incurring legal expenses in attempting to resist this illegal and discriminatory activity of the defendant, Polk County, while attempting to resolve this matter through the grievance process.

(e) That there are hundreds of individuals who are similarly situated with George Lane and being handicapped who have had and continue to have a need, requirement, or desire to participate in the judicial process of Polk County, Tennessee.

V.

PLAINTIFF JONES PROCEDURAL HISTORY

(a) Plaintiff Jones, hereinafter referred to as Jones, is a paraplegic confined to a wheelchair because of an automobile accident in 1989. She is currently responsible for the care and support of two minor children. Jones is a certified court reporter. She became certified and has actively worked in her chosen field since 1990. She works out of her home and is called upon by attorneys and other parties to work all over Middle Tennessee in her profession. This specifically includes going to courthouses for the purposes of recording proceedings before the state courts in proceedings conducted in those courthouses. Her inability to gain access to the courtroom has caused her to continue to have difficulty accessing the services of the judiciary.

(b) She has specifically attempted to gain access to the courthouses in Trousdale, Jackson, Clay and Pickett Counties. Jones has not been able to gain access to the courtrooms due to the lack of handicap access to the courtrooms used in those counties. She would also be

prepared to appear in any and all other courthouses of this state to provide services to the courts, attorneys and parties, if called upon to do so.

(c) Jones has specifically brought to the attention of authorities in the four defendant counties, Trousdale, Jackson, Clay and Pickett, their failure to comply with the requirements of the ADA, yet, with the exception of Trousdale County, they have failed to comply with the requirements. Trousdale County installed an elevator in 1998, however the courtroom itself is set up where Jones cannot gain access to the court proceedings. The proceedings occur on an elevated platform to which she cannot gain ready access.

(d) As a direct result of the courthouses located in Trousdale, Jackson, Clay and Pickett Counties of this State not complying with the ADA Jones has lost work and an opportunity to participate in the judicial process because of her inability to gain access to their courthouses.

VI.

THE STATE OF TENNESSEE'S AND OTHER DEFENDANT'S HISTORY CONCERNING THE AMERICANS WITH DISABILITY ACT

(a) That the State of Tennessee administers its judicial functions in the county courthouses of each of the counties of this state. As a part of that function, the State of Tennessee provides services through these buildings to all of its citizens and others. It is in these buildings that virtually all trial level judicial proceedings, civil and criminal, are conducted. In addition, these buildings house clerk's offices where the court's records are maintained. As a part of these proceedings, individuals are called upon to

participate as parties in civil and criminal proceedings, or participate as witnesses and jurors, and go to these offices to take care of public business in the form of filing papers and researching records, and have a fundamental right under the Tennessee State Constitution to participate and view the judicial proceedings that are conducted in those courtrooms.

(b) That like Polk County and the other named defendants, the State of Tennessee is required to conform to the Department of Justice regulations found at 28 C.F.R. Part 35 and is required to do an evaluation of the facilities in which its services are rendered.

(c) That despite this evaluation process and the requirement of the ADA, the State of Tennessee persisted in requiring Lane to participate in services and proceedings in a building that failed to comply with the law, or alternatively not allowing him access to the same services and proceedings of other citizens of the State and County who are not individuals with a disability. This was despite the fact that the officials of the State of Tennessee were repeatedly confronted with the State and county's failure to comply with the ADA. The State of Tennessee has repeatedly failed to comply with the law. Specifically, counsel for the plaintiff Lane raised the ADA issue at every appearance required of plaintiff to the court and the District Attorney General's office. Counsel addressed a letter directly to Charles Burson, Attorney General for the State of Tennessee, on December 4, 1996 after making repeated phone calls to his office. None of these phone calls or the letter were responded to in any way. Plaintiff Lane appealed the State Trial judges requirements to proceed with the case to all levels of the judiciary of the State of Tennessee. Each time, the office of the Attorney

General insisted on ignoring the legal violation and advocating the same to each court, and the State courts specifically ignored the uncontradicted facts that were presented to them.

(d) That the State of Tennessee and other named defendants persist on conducting their judicial proceedings in facilities that do not conform to the requirements of the ADA and as such deny to all citizens similarly situated the right to participate in the judicial process of this State as conducted in the defendant counties. Specifically, the State of Tennessee conducts its judicial proceedings in county courthouses that do not comply with the access requirements of the ADA. Those counties are: Bledsoe County, Cannon County, Chester County, Claiborne County, Clay County, Cocke County, Decatur County, Fayette County, Grainger County, Hancock County, Hawkins County, Hickman County, Jackson County, Jefferson County, Johnson County, Lake County, Lewis County, Meigs County, Moore County, Perry County, Pickett County, Trousdale County, and Van Buren County. There may well be other counties that do not fully comply with the requirements of the ADA. These defendants, like Polk County, have had a duty to comply with the requirement of the law since 1992, yet they have knowingly and intentionally failed to cause their courthouses to conform to the ADA.

(e) That there are thousands of individuals who reside in the State of Tennessee and have a need, as well as a right, to participate in the judicial processes of this State without the obstructions associated with the physical condition of the States Courthouses. In the year 1998, the State of Tennessee had issued over 200,000 handicapped placards for people with physical handicaps.

Despite the fact that the regulations and law of the United States dictates [sic] that these obstructions be eliminated, the State of Tennessee and its subordinate political bodies have failed to bring these buildings into compliance.

VI.

CAUSES OF ACTION

(a) That the State of Tennessee and Polk County have discriminated against the plaintiff, George Lane in that they have excluded him from participation in, or denied him the benefits of, the services of its court systems in violation of 42 U.S.C. 12132.

(b) That the State of Tennessee, Trousdale County, Jackson County, Clay County, and Pickett Counties specifically, and the other defendants generally, have discriminated against the plaintiff Beverly Jones in that they have excluded her from participating in the services offered by the courthouses and access to the Court proceedings of this State by failing to eliminate physical obstacles to her participation in the judicial processes of this State in violation of 42 U.S.C. 12132.

(c) That the State of Tennessee and Bledsoe County, Cannon County, Chester County, Claiborne County, Clay County, Cocke County, Decatur County, Fayette County, Grainger County, Hancock County, Hawkins County, Hickman County, Jackson County, Jefferson County, Johnson County, Lake County, Lewis County, Meigs County, Moore County, Perry County, Pickett County, Trousdale County, and Van Buren County knowingly and intentionally continue to discriminate against George Lane, Beverly Jones and all other individuals similarly situated who

have a need, responsibility, or desire to attend the judicial process of this state as it is conducted in the Courthouses of this State in that they conduct their judicial proceedings in facilities that are not in conformance with the requirements of the ADA. Further, there may be other counties of this State that have failed to fully comply with the requirement of the ADA.

(d) That the actions of the State of Tennessee and Polk Country, Trousdale, Jackson, Clay and Pickett Counties and the other named defendants were conscious, deliberate, and intentional in their active discrimination against the plaintiffs, George Lane and Beverly Jones, and all other similarly situated handicapped individuals of this State. That Polk County's consistent insistence in continuing the prosecution of Lane's case, without delay and despite plaintiff's inability to gain access to the courtroom, was with full knowledge of his disability and their knowledge of the requirement to conform to the ADA.

(e) That the actions of the State of Tennessee, Trousdale County, Jackson County, Clay County, and Pickett County were conscious, deliberate, and intentional in their active discrimination against the plaintiffs, George Lane and Beverly Jones and all other similarly situated handicapped individuals of this State. That their persistent presentation of the actions of the judicial process was with full knowledge of plaintiffs' disability and with their knowledge of the requirements to conform to the ADA.

(f) That the actions of the State of Tennessee and the other defendant counties were conscious, deliberate, and intentional in their active discrimination against all other similarly situated handicapped individuals of this State.

That their persistent presentation of the actions of the judicial process, knowing that handicapped individuals were unable to gain access to the courtrooms, was with full knowledge of their disabilities and their knowing failure to meet the requirements to conform to the ADA.

(g) That in the alternative, the actions of the State of Tennessee and said counties were knowing and resulted from the defendants' negligence in complying with the law.

(h) That as a result of the defendants' actions, the plaintiff Lane has suffered damages in the form of extreme embarrassment, and humiliation and anxiety of the delays associated with this case. In addition, he has incurred attorney fees and expenses including court costs in excess of $600 assessed by the State of Tennessee for his asking the appellate courts of the State of Tennessee to delay his prosecution until the Polk County Courthouse was brought into compliance with the ADA.

(i) That as a result of the defendants' actions, the plaintiff Jones has suffered damages in the form of extreme embarrassment, and humiliation in attempting to gain access to the services provided by the State of Tennessee and Trousdale, Jackson, Clay and Pickett Counties and not being able to be accommodated. In addition, plaintiff has suffered lost wages and earnings associated with her inability to conduct her profession in said counties' courtrooms.

VII.

REQUEST FOR CERTIFICATION AS CLASS ACTION

(a) Now come the plaintiffs, who in addition to bringing this action on behalf of themselves, would request

this court to certify them as class representatives pursuant to the provisions of Rule 23 of the Federal Rules of Civil Procedure, on behalf of all individuals residing in the State of Tennessee who are qualified individuals with a physical disability that prevent them from climbing stairs or walking up steep inclines in the courthouses of the named defendants. These individuals have been subjected to discrimination like the plaintiffs and continue to experience this discrimination and the denial of services. Each of these individuals have [sic] the right to attend judicial proceedings in the courthouses of this state and specifically the named defendant counties and would currently not have access to the judicial processes in the named defendant counties without going through the humiliation and embarrassment that the plaintiffs George Lane and Beverly Jones have been forced to endure. In addition, these individuals may be called or have cause to participate in those proceedings as parties, witnesses or jurors.

(b) Plaintiffs would show that the certification of this class is proper in that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of fact and law that are common to the class, (3) the claims and defenses of the representative party is [sic] typical of the claims and defenses of the class, and (4) the representative party will fairly and adequately protect the interest of the class.

(c) Plaintiffs would further show that the defendants have acted, or refused to act, on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Further, that the questions of fact and fact common to the members of the class predominate over any questions affecting only individual

members. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

VIII.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff would hereby request this Honorable Court to:

1. Render judgment against the State of Tennessee and Polk County for damages for the plaintiff Lane's humiliation and embarrassment during the course of these proceedings in an amount not to exceed $100,000 as well as his attorney fees, cost and expenses pursuant to the provisions of 42 U.S.C. 12133 and 29 U.S.C. 794a. for defending him in the grievance procedure, his vindication of his rights in the state court, and for bringing this action.

2. Render judgment against the State of Tennessee, Trousdale, Jackson, Clay and Pickett Counties for damages for the plaintiff Jones' humiliation and embarrassment associated with her attempting to gain access to the defendants' courthouses and for her damages associated with her lost earnings associated with her inability to work in said courthouses in an amount not to exceed $250,000 as well as her attorney fees, cost and expenses pursuant to the provisions of 42 U.S.C. 12133 and 29 U.S.C. 794a. for bringing this action.

3. That this court certify this as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and that proper notice be given to all individuals in the class in order that they may make the proper elections.

4. That this court take such actions necessary and proper through declaratory judgment and injunctive relief to compel the State of Tennessee and other defendants to comply with the provisions of the Americans with Disability Act, and further award such damages to the class representatives as are fair and proper. Further that this court award damages to each member of the class for said humiliation and embarrassment associated with the defendants failure to comply with the ADA. Further that the court compel the State of Tennessee to do a survey of all counties of the State of Tennessee to determine if they in fact fully comply with the provisions of the State of Tennessee, and if they fail to do so join them as party defendants and compel them to comply with the ADA.

5. That this court grant general relief to the plaintiff and all other persons that are members of the class.

Respectfully Submitted,
George Lane, and
Beverly Jones, Plaintiffs

By: /s/ William Brown
William J. Brown, Attorney
23 N. Ocoee, P.O. Box 1001
Cleveland, TN 37364-1001
(423) 476-4515
TBPR # 005450

Supreme Court, U.S.
FILED
MAY 30 2003
OFFICE OF THE CLERK

(2)

No. 02-1667

In the Supreme Court of the United States

STATE OF TENNESSEE, PETITIONER

v.

GEORGE LANE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record

RALPH F. BOYD, JR.
Assistant Attorney General

JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

11pp

QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	6
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Alsbrook v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999), cert. granted, 528 U.S. 1146, cert. dismissed, 529 U.S. 1001 (2000)	8
Board of Trs. of the Univ. of Ala. v. *Garrett*, 531 U.S. 356 (2001)	6, 8
District of Columbia Ct. of App. v. *Feldman*, 460 U.S. 462 (1983)	4
Hason v. *Medical Bd.*, 279 F.3d 1167 (9th Cir.), cert. granted, 123 S. Ct. 561 (2002), cert. dismissed, 123 S. Ct. 1779 (2003)	7
Garcia v. *S.U.N.Y. Health Sciences Ct.*, 280 F.3d 98 (2d Cir. 2001)	7
Medical Bd. v. *Hason*, cert. granted, 123 S. Ct. 561 (2002), cert. dismissed, 123 S. Ct. (2003)	8
Olmstead v. *L.C.*, 527 U.S. 581 (1999)	2
Popovich v. *Cuyahoga County Ct. of Common Pleas*, 276 F.3d 808 (6th Cir.), cert. denied, 123 S. Ct. 72 (2002)	5, 6, 7
Puerto Rico Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993)	5
Randolph v. *Rodgers*, 253 F.3d 342 (8th Cir. 2001)	6-7
Reickenbacker v. *Foster*, 274 F.3d 974 (5th Cir. 2001)	6
Rooker v. *Fidelity Trust Co.*, 263 U.S. 413 (1923)	4

Cases—Continued: Page

Thompson v. *Colorado*, 278 F.3d 1020 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002) 7
Walker v. *Snyder*, 213 F.3d 344 (7th Cir. 2000), cert. denied, 531 U.S. 1190 (2001) 6
Wessel v. *Glendening*, 306 F.3d 203 (4th Cir. 2002) 6

Constitution and statute:

U.S. Const. Amend. XI 2, 3, 5, 6
Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* 2
42 U.S.C. 12101(b)(1) 2
42 U.S.C. 12101(b)(4) 2
42 U.S.C. 12202 3
Title I, 42 U.S.C. 12111-12117 ..... 2, 6
Title II, 42 U.S.C. 12131-12165 ..... 2, 3, 5, 6, 7
42 U.S.C. 12131(1)(A) 3
42 U.S.C. 12131(1)(B) 3
42 U.S.C. 12132 3
42 U.S.C. 12133 2
Title III, 42 U.S.C. 12181-12189 2

In the Supreme Court of the United States

No. 02-1667

STATE OF TENNESSEE, PETITIONER

v.

GEORGE LANE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The amended opinion of the court of appeals on panel rehearing (Pet. App. 1-5) is reported at 315 F.3d 680. The original opinion of the court of appeals (Pet. App. 10-11) and the order of the district court denying petitioner's motion to dismiss (Pet. App. 6-7) are unreported.

JURISDICTION

The court of appeals entered its original judgment on July 16, 2002. A petition for panel rehearing was filed, and the court of appeals issued its amended opinion on January 10, 2003. On March 4, 2003, Justice Stevens extended the time within which to file a petition for a writ of certiorari to May 12, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States intervened in this action in the court of appeals to defend the constitutionality of the Disabilities Act's abrogation of the States' Eleventh Amendment immunity from suit for cases brought under Title II of the Act. The court of appeals sustained the constitutionality of the abrogation as applied in this case. For the reasons explained below, and in particular the fact that the Court has already granted certiorari on this issue on three prior occasions, the United States respectfully suggests that the petition for a writ of certiorari should be granted.

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, is a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities. In passing the Disabilities Act, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4).

The Disabilities Act's prohibitions on discrimination are enforceable against public entities through private suits. See, *e.g.*, 42 U.S.C. 12133; see also *Olmstead* v. *L.C.*, 527 U.S. 581, 590 (1999). In the Disabilities Act,

Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202 (a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter").

This case involves a suit under Title II of the Disabilities Act, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is expressly defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A) and (B).

2. Respondent George Lane has paraplegia and uses a wheelchair to ambulate. In 1996, petitioner charged Lane with two misdemeanor offenses and summoned him to appear before the state court, which was sitting in the Polk County Courthouse in Benton, Tennessee, to answer the charges. All court proceedings in that courthouse take place on the second floor. At the time, the building had no elevator. At his first appearance, Lane crawled up two flights of stairs to get to the courtroom. He was arraigned and ordered to appear at a later date for his hearing. When Lane returned to the courthouse for that hearing, he notified the court that he would not crawl to the courtroom again and further declined to be carried by officers. The court then ordered Lane's arrest, and he was taken into custody and jailed. In all further proceedings, Lane was left on the ground floor of the courthouse while his counsel shuttled back and forth between him and the second-

floor courtroom. Additional proceedings were held on the ground floor of the courthouse in locations that were not open to the public. Pet. App. 15-16. Lane filed emergency appeals with the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court, both of which were denied. See *id.* at 16-17. The trial court subsequently entered an order holding the remainder of the criminal proceedings in abeyance pending the construction of an elevator at the courthouse. *Id.* at 17.[1]

Respondent Beverly Jones also has paraplegia and uses a wheelchair to ambulate. Jones is a certified

[1] Petitioner subsequently dismissed one of the misdemeanor charges, and Lane pled guilty to the other, which was a charge of driving with a revoked license. The present action does not attempt to impeach Lane's conviction, because the conviction was entered during a proceeding in which he had access to the courtroom. Furthermore, during the emergency appeal proceedings at the preliminary stage of the prosecution, petitioner advised Lane that the criminal charges "are separate and distinct from any alleged violations based on the Americans with Disabilities Act," and that "[a]ny relief on the alleged [Disabilities Act] violations would need to be presented in a civil lawsuit, in either a state or federal civil court of record." Tenn. Opp. to Applic. for Permission to Appeal at 6 n.1, *Tennessee* v. *Lane*, No. 03C01-9704-CR-00158 (Tenn. S. Ct.). The state trial court likewise directed Lane to pursue separate civil relief for his claimed Disabilities Act violations. 3/17/97 Tr. at 5, *Tennessee* v. *Lane*, No. 97-017 (Polk County Crim. Ct.) (reproduced as Exhibit D to Lane's Applic. for Extraordinary Appeal, *Tennessee* v. *Lane*, No. 03C01-9704-CR-00158 (Tenn. S. Ct.) ("I think you have the right to sue the county and cause them to do these things you're talking about. But I don't think that it would result in dismissal of your client from criminal court."); see also *id.* at 7-8. This case accordingly does not appear to implicate the *Rooker-Feldman* doctrine, see *District of Columbia Ct. of App.* v. *Feldman*, 460 U.S. 462, 482 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923).

court reporter in Tennessee. Her inability to access numerous state court proceedings due to the inaccessibility of the courthouses in which hearings are held has impaired her ability to attract clients and to offer, provide, and complete services for her clients. Pet. App. 19-20.

Lane and Jones filed suit against petitioner and 25 Tennessee counties alleging that their ongoing operation of courthouses that are inaccessible to members of the public with mobility impairments violates Title II of the Disabilities Act. Lane and Jones also seek to represent a class of persons who, because of their physical disabilities, cannot access courthouses in Tennessee. The complaint seeks injunctive relief and damages. Pet. App. 23-28. Petitioner filed a motion to dismiss on Eleventh Amendment grounds, which the district court denied. *Id.* at 6-7.

3. Petitioner filed an interlocutory appeal, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), and the district court stayed further proceedings in the case and a ruling on the motion for class certification pending resolution of that appeal. The United States intervened on appeal.

While the appeal was pending, the en banc court of appeals issued its decision in *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir.), cert. denied, 123 S. Ct. 72 (2002). In *Popovich*, the Sixth Circuit held that Congress validly abrogated the States' Eleventh Amendment immunity for claims under Title II that are based on due process principles, but not for claims based on equal protection principles.

Applying *Popovich*, the court of appeals issued an unpublished, per curiam order in the instant case affirming the district court's denial of petitioner's motion to dismiss on the ground that Lane's and Jones's claims

implicate due process principles. Pet. App. 10-11. On petitioner's motion for panel rehearing, the court of appeals issued an amended opinion, *id.* at 1-5, that again affirmed the district court's denial of the motion to dismiss. The court noted that, under *Popovich*, "Title II is an appropriate means of enforcing the due process rights of individuals," and that "Jones and Lane are seeking to vindicate their right of access to the courts in Tennessee." *Id.* at 5. Beyond that, the court explained that "[t]he difficult questions" concerning whether Lane's and Jones's claims ultimately vindicate due process rights "cannot be clarified absent a factual record." *Ibid.* The court of appeals accordingly remanded the case for further proceedings.

DISCUSSION

The government agrees with petitioner (Pet. 8-14) that the question of Congress's power to abrogate the States' Eleventh Amendment immunity for claims under Title II of the Disabilities Act is an important question that merits review by this Court in this case. Since this Court's decision in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), which invalidated the abrogation of Eleventh Amendment immunity for Title I of the Disabilities Act, the courts of appeals have broadly divided on the constitutionality of Congress's abrogation of Eleventh Amendment immunity for Title II of the Disabilities Act. The Fourth, Fifth, Seventh, Eighth, and Tenth Circuits have held that the abrogation for Title II suits cannot be sustained as valid Section 5 legislation. See *Wessel* v. *Glendening*, 306 F.3d 203 (4th Cir. 2002); *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001); *Walker* v. *Snyder*, 213 F.3d 344 (7th Cir. 2000), cert. denied, 531 U.S. 1190 (2001); *Randolph* v. *Rodgers*, 253

F.3d 342, 345 n.4 (8th Cir. 2001); *Thompson* v. *Colorado*, 278 F.3d 1020 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002). The Ninth Circuit has upheld the abrogation. See *Hason* v. *Medical Bd.*, 279 F.3d 1167, cert. granted, 123 S. Ct. 561 (2002), cert. dismissed, 123 S. Ct. 1779 (2003). The Second Circuit has held that the abrogation can be sustained in Title II cases if the government's action was undertaken with "discriminatory animus or ill will towards the disabled." *Garcia* v. *S.U.N.Y. Health Sciences Ctr.*, 280 F.3d 98, 111 (2001). And the Sixth Circuit, in both this case and *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (en banc), cert. denied, 123 S. Ct. 72 (2002), has held that the abrogation is invalid for claims enforcing the right to equal protection, but is valid for claims enforcing due process rights.[2]

Accordingly, the conflict in the circuits is mature and entrenched. The relevant legal issues have been thoroughly aired in the courts of appeals; postponing review is not likely to contribute to the reasoned resolution of the question presented. The volume of cases in which the question has arisen demonstrates that the question presented is of recurring importance and that conflicting decisions are likely to proliferate in the courts of appeals. Finally, because the court of appeals' decision implicates the constitutionality of a provision of federal civil rights law—a provision that has been held unconstitutional in whole or in part in seven

---

[2] The issue is currently pending in four other circuits. See *Kiman* v. *New Hampshire Dep't of Corrs.*, No. 02-1099 (1st Cir.) (en banc oral argument scheduled for June 5, 2003); *Bowers* v. *NCAA*, No. 01-4226 (3d Cir.) (oral argument scheduled for July 8, 2003); *Goodman* v. *Ray*, No. 02-10168 (11th Cir.) (oral argument held Nov. 13, 2002); *Barbour* v. *WMATA*, No. 03-7051 (D.C. Cir.) (pending briefing).

circuits—the question presented is of broad and enduring importance and thus merits this Court's review.

Indeed, the appropriateness of the question for this Court's review is reflected in the fact that this Court previously has granted certiorari to resolve the question three times, including earlier in this Term. See *Medical Board* v. *Hason*, cert. granted, 123 S. Ct. 561 (2002), cert. dismissed on motion of petitioner, 123 S. Ct. 1779 (2003) (No. 02-479); *Garrett*, 531 U.S. at 360 n.1 (dismissing as improvidently granted that portion of the writ of certiorari addressing the constitutionality of the abrogation for Title II); *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), cert. granted, 528 U.S. 1146, cert. dismissed, 529 U.S. 1001 (2000) (dismissed by agreement of the parties).

In short, the question presented is ripe for review, and the government has identified no factual, jurisdictional, or procedural barriers in this case that would stand as an obstacle to the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

RALPH F. BOYD, JR.
Assistant Attorney General

JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
Attorneys

MAY 2003

Supreme Court, U.S.
FILED
JUN 0 2 2003
OFFICE OF THE CLERK

No. 02-1667

IN THE
Supreme Court of the United States

State of Tennessee,

Petitioner,

v.

George Lane, Beverly Jones, and
United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE PRIVATE RESPONDENTS

Samuel R. Bagenstos
1545 Massachusetts Ave.
Cambridge, MA 02138

Thomas C. Goldstein
Goldstein & Howe, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

William J. Brown
(Counsel of Record)
William J. Brown & Assocs.
23 North Ocoee St.
Cleveland, TN 37364
(423) 476-4515

June 2, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.*, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment and thus validly abrogates state sovereign immunity.

2. Whether the Section 5 analysis of Title II should proceed on a facial basis that considers the statute as a whole or should instead examine whether Congress had power to apply the statute to the particular circumstances of this case.

3. Whether Title II is valid Section 5 legislation only when applied to enforce the Due Process Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
BRIEF FOR THE PRIVATE RESPONDENTS 1
OPINIONS BELOW 1
JURISDICTION 1
STATEMENT 1
REASONS FOR GRANTING THE WRIT 5

I. This Case Implicates The Conflict Over Whether ADA Title II Is Proper Section 5 Legislation 6

II. This Case Implicates The Conflict Over Whether Section 5 Challenges To ADA Title II Must Be Evaluated In A Facial Or An As-Applied Manner 10

III. This Case Presents the Important Question of What Constitutional Violations ADA Title II Must Seek to Remedy in Order Validly to Abrogate State Sovereign Immunity 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

BE&K Constr. Co. v. *NLRB*, 536 U.S. 516 (2002) 12

Board of County Comm'rs v. *Umbehr*, 518 U.S. 668 (1996) 7

Board of Trustees v. *Garrett*, 531 U.S. 356 (2001) 6, 8, 9

Boddie v. *Connecticut*, 401 U.S. 371 (1971) 12

City of Boerne v. *Flores*, 521 U.S. 507 (1997) 14

Dare v. *California*, 191 F.3d 1167 (9th Cir. 1999), cert. denied, 531 U.S. 1190 (2001) 11

Doe v. *Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001) 7

Faretta v. *California*, 422 U.S. 806 (1975) 12

Garcia v. *S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001) 9, 10, 14

Griffin v. *Breckenridge*, 403 U.S. 88 (1971) 11, 14

Hason v. *Medical Bd.*, 279 F.3d 1167 (9th Cir. 2002), cert. dismissed, 123 S. Ct. 1779 (2003) 9

Kiman v. *New Hampshire Dep't of Corrections*, 301 F.3d 13, vacated on grant of reh'g en banc, 310 F.3d 785 (1st Cir. 2002) 7, 10

Kimel v. *Florida Board of Regents*, 528 U.S. 62 (2000) 13

Klingler v. *Director, Dep't of Revenue*, 281 F.3d 776 (8th Cir. 2002) (per curiam) 9

Kroll v. *St. Charles County*, 766 F. Supp. 744 (E.D. Mo. 1991) 12

Layton v. *Elder*, 143 F.3d 469 (8th Cir. 1999) 12

M.L.B. v. *S.L.J.*, 519 U.S. 102 (1996) 12

Matthews v. *Jefferson*, 29 F. Supp. 2d 525 (W.D. Ark. 1998) 12

Nevada Dep't of Human Resources v. *Hibbs*, No. 01-1368 (May 27, 2003) 8

Olmstead v. *L.C.*, 527 U.S. 581 (1999) 8

Popovich v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir.) (en banc), cert. denied, 123 S. Ct. 72 (2002) ..... passim

Press-Enterprise Co. v. *Superior Court*, 478 U.S. 1 (1986) 12

Reickenbacker v. *Foster*, 274 F.3d 974 (5th Cir. 2001) 9

Romer v. *Evans*, 517 U.S. 620 (1996) 7

Shotz v. *Cates*, 256 F.3d 1077 (11th Cir. 2001) 12

Thompson v. *Colorado*, 278 F.3d 1020 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002) 9, 11

United States v. *Raines*, 362 U.S. 17 (1960) 11, 14

United States v. *Salerno*, 481 U.S. 739 (1987) 11

Walker v. *Snyder*, 213 F.3d 344 (7th Cir. 2000), cert denied, 531 U.S. 1190 (2001) 9

Waller v. *Georgia*, 467 U.S. 39 (1984) 3, 12

Waters v. *Churchill*, 511 U.S. 661 (1994) 7

Wessel v. *Glendening*, 306 F.3d 203 (4th Cir. 2002) 9, 11

Youngberg v. *Romeo*, 457 U.S. 307 (1982) 8

Statutes

42 U.S.C. 12101(a)(3) 9

42 U.S.C. 12131 i

42 U.S.C. 12132 ..... 2, 8

42 U.S.C. 12134 2

42 U.S.C. 12181(7) 8

Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.* ..... passim

Regulations

28 C.F.R. 35.105 2
28 C.F.R. 35.150(a) 2, 12
28 C.F.R. 35.150(c) 2
28 C.F.R. 35.150(d)(1) 2

Other Authorities

Brief for the United States, *Medical Board of California v. Hason*, No. 02-479 9

BRIEF FOR THE PRIVATE RESPONDENTS

Respondents George Lane and Beverly Jones respectfully acquiesce in the Petition for Writ of Certiorari filed by the Attorney General and Reporter for the State of Tennessee in this cause.

OPINIONS BELOW

The opinions below are correct as presented.

JURISDICTION

The respondents acknowledge the jurisdiction of the court to entertain the petition.

STATEMENT

This case involves the State of Tennessee's failure, in violation of federal law, to conduct proceedings at courthouses that are accessible to individuals with disabilities. The plaintiffs, two Tennessee residents with paraplegia, were denied access to judicial proceedings because those proceedings were held in courtrooms on the second floors of buildings lacking elevators. One of the plaintiffs, Beverly Jones, sought access to those proceedings to perform her work as a court reporter. The other plaintiff, George Lane, was harmed when the state held proceedings in the criminal case in which he was a defendant in the inaccessible second-floor courtroom; *the state arrested him* for failure to appear when he refused to crawl or be carried up the steps. Lane and Jones filed this suit under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, to challenge the state's failure to hold proceedings in accessible courthouses.

1. *The Statutory Scheme*—The ADA was signed into law on July 26, 1990, and Title II took effect eighteen months later. See 42 U.S.C. 12131 note. Title II broadly prohibits any "public entity"—including state governments—from "subject[ing]" any "qualified individual with a disability" to

"discrimination." *Id.* § 12132. To give content to that broad requirement, Congress expressly required the Attorney General to promulgate regulations implementing Title II. *Id.* § 12134. The Attorney General's regulations, which became effective January 26, 1992, require public entities to "operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a).

Recognizing that this mandate might require states to make physical alterations of buildings, the Attorney General included a series of provisions to accommodate states' need for an orderly transition to compliance. The Attorney General required each public entity, by January 26, 1993, to "evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and * * * proceed to make the necessary modifications." 28 C.F.R. 35.105. Where "structural changes to facilities" were necessary to achieve compliance, the regulations required entities like Tennessee to "develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes." 28 C.F.R. 35.150(d)(1). And "[w]here structural changes in facilities are undertaken to comply" with the accessibility requirement, the regulations provided that "such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible." *Id.* § 35.150(c).

2. *The Facts—(a) George Lane*—Respondent George Lane has paraplegia and uses a wheelchair for mobility. Pet. App. 13. In September 1996, Lane was compelled to appear at the Polk County courthouse to answer a set of criminal charges the state had filed against him. Pet. App. 15. Although Title II had been in effect for over four years at that point, the courthouse had not been brought into compliance with the statute's accessibility requirements. Because all proceedings in that courthouse occurred in rooms on the second

floor, and the building had no elevator, Lane was required to leave his wheelchair and crawl up the steps with his hands in order to appear in court. *Id.* Following his arraignment on the charges, Lane was summoned to appear at an October hearing in the same courtroom. *Id.* Lane duly arrived at the courthouse but sent word to the trial judge that he refused to go through the humiliation of crawling up the courthouse steps again, nor would he put his safety at risk by permitting court employees to carry him up the steps. *Id.* On the order of the trial judge, Lane was arrested for failure to appear and taken to jail. *Id.*

Subsequent proceedings in Lane's criminal case occurred in the same inaccessible courthouse. At these proceedings, Lane typically waited at the bottom of the stairs while his attorney shuttled back and forth to the courtroom. Pet. App. 16. As a result, the court conducted proceedings, including discussing the course of future proceedings and the possibility of a change of venue, out of Lane's presence. Lane did have an opportunity to attend his preliminary hearing, which was held in the ground-floor courthouse library, but that location was not generally accessible to the public. Pet. App. 16; cf. *Waller* v. *Georgia*, 467 U.S. 39, 48 (1984) (criminal defendant has constitutional right to public suppression hearing). When an arraignment hearing was called in the second-floor courtroom after the grand jury returned an indictment containing new misdemeanor charges in March 1997, Lane's attorney requested that the court dismiss or at least stay the proceedings until accessible facilities could be provided. Pet. App. 16. The trial court denied that request; the judge ruled that Lane might have a right to bring an independent civil suit to make the courthouse accessible, but that the inaccessibility was no basis for not moving forward with the pending case. See 3/17/97 Tr. 5. The Tennessee appellate courts declined to accept jurisdiction over Lane's request for extraordinary relief. Pet. App. 16-17. Proceedings were subsequently stayed in Lane's criminal case, *id.* 17, and Lane ultimately pleaded

guilty to a single charge of driving on a revoked license after the state added an accessible elevator to the courthouse.

(b) Beverly Jones—Respondent Beverly Jones has paraplegia and uses a wheelchair for mobility. Pet. App. 19. She works as a certified court reporter, but because courthouses in many Tennessee counties are inaccessible, her opportunity to perform her work has been significantly impeded. *Id.* 19-20; see *id.* 22 (listing 23 Tennessee counties in which the courthouses were inaccessible at the time the complaint was filed in this case). She has specifically requested modifications to the courthouses in four Tennessee counties, but none has been made accessible to her. *Id.* 20.

3. Proceedings Below—Respondents brought this suit against petitioner and a number of Tennessee counties under Title II seeking injunctive relief and damages. They sued in their individual capacities and as representatives of a class of persons denied access to the state's courthouses because of their disabilities. The district court declined to dismiss the case on Eleventh Amendment grounds. Pet. App. 6-7.

On petitioner's appeal, the United States intervened. The Sixth Circuit affirmed the district court's judgment on the basis of the *en banc* court's holding in *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808, cert. denied, 123 S. Ct. 72 (2002), that ADA Title II validly abrogates the states' sovereign immunity to the extent the statutory violation implicates due process principles. *Popovich* held, however, that the abrogation is invalid to the extent the statutory violation in question instead implicates equal protection principles. As amended on rehearing, the panel's opinion explained that respondents were "seeking to vindicate" their due process "right of access to the courts in Tennessee." Pet. App. 5. The panel left for remand the fact-specific question whether respondents' allegations amount to "due process violations." *Id.*

REASONS FOR GRANTING THE WRIT

The judgment of the Sixth Circuit was correct and should be affirmed. Title II of the ADA—whether considered on its face or as applied to the specific fact setting of this particular case—is a proper exercise of Congress's authority to enforce the Fourteenth Amendment. Accordingly, the district court was correct to deny the state's motion to dismiss, and the Sixth Circuit was correct to affirm that denial.

We agree with the state, however, that this Court should grant the petition for certiorari. The courts of appeals are deeply split over both of the issues presented by the state's petition. On the basic constitutional question, three circuits and a panel of a fourth have held that Title II is, at least in some circumstances, proper Section 5 legislation; five circuits have rejected that conclusion and held that the statute exceeds Congress's Section 5 power. On the facial-versus-as-applied question, two circuits and a panel of a third have held that challenges to the Section 5 basis for Title II must be evaluated in an as-applied manner, while three circuits have held that challenges to the statute's Section 5 basis are necessarily facial in nature. This case squarely implicates both issues that have divided the courts of appeals.

This case furthermore presents the unusual circumstance in which civil litigants' interests lie in acquiescing to certiorari from a judgment under which they prevailed. This Court has granted certiorari to decide the first question presented *three* separate times in recent Terms. Even if this Court were not to review this particular case, it seems all but inevitable that the Court would relatively soon resolve the validity of Title II's abrogation of state sovereign immunity in another case. Proceedings on remand in this case in the meantime under the cloud of uncertainty that hangs over Title II claims against state entities are all but pointless. So long as the state retains the prospect that this Court will vindicate its sovereign immunity claims in some other Title II case, the state will have no incentive to enter into meaningful settlement discus-

sions and every incentive to delay the proceedings in the lower courts for as long as possible.

Moreover, respondents have an important interest in review in this Court because, although the Sixth Circuit's *judgment* is entirely correct, the discussion in that court's opinion reflects an unnecessarily crabbed view of the circumstances in which Title II might validly abrogate state sovereign immunity. In particular, the Sixth Circuit's suggestion that Title II validly abrogates state sovereign immunity *only* when it enforces due process rights and *never* when it enforces equal protection rights may lead the district court to be unjustifiably skeptical of respondents' claims, which rest on a right of access to courts that implicates both due process and equal protection principles. Respondents Lane and Jones accordingly have a strong interest in this Court's prompt resolution of the questions presented by this case.

I. This Case Implicates The Conflict Over Whether ADA Title II Is Proper Section 5 Legislation

In *Board of Trustees* v. *Garrett*, 531 U.S. 356 (2001), this Court held that Congress exceeded its authority under Section 5 of the Fourteenth Amendment by applying ADA Title I to the actions of state governments. However, the Court specifically limited its holding to Title I of the statute (the title that prohibits disability-based employment discrimination) and reserved the question whether Title II (which prohibits disability-based discrimination in the provision of public services) could nonetheless be upheld as a proper exercise of Congress's Section 5 power. See *id.* at 360 n.1; *id.* at 371 n.7. And indeed, the Section 5 basis for Title II is substantially stronger than is the Section 5 basis for Title I.

First, "the scope of the constitutional right at issue," *Garrett*, 531 U.S. at 365, is different. Title I applies to state governments only when they act in their capacity as employers—a context in which the state's decisions are judged only by the deferential rational basis test. See *id.* at 366-368; cf.

Board of County Comm'rs v. *Umbehr*, 518 U.S. 668, 676 (1996) ("'[T]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.'") (quoting *Waters* v. *Churchill*, 511 U.S. 661, 675 (1994) (plurality)). But Title II much more directly enforces the principle that is "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection"—"the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996).

Not only does Title II operate broadly to protect individuals with disabilities against being effectively shut out of opportunities to have access to and influence on their state governments, but the statute also applies to a wide range of specific circumstances in which states have obligations to individuals with disabilities that go well beyond the minimal requirement of a rational basis. The fact setting of this case, which involves access to judicial proceedings and public facilities, provides one example. See Pet. App. 3; *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 813-815 (6th Cir.) (en banc) (detailing obligations that the Due Process Clause imposes on states to assure that individuals with disabilities can participate meaningfully in proceedings that adjudicate important rights), cert. denied, 123 S. Ct. 72 (2002). The statute's application to election procedures and voting qualifications,[1] the conditions of confinement of prisoners with disabilities,[2] and the unnecessary institutionali-

---

[1] See, *e.g.*, *Doe* v. *Rowe*, 156 F. Supp. 2d 35, 51-59 (D. Me. 2001) (state constitutional provision disenfranchising persons under guardianship by reason of mental illness violates both the Fourteenth Amendment and ADA Title II).

[2] See, *e.g.*, *Kiman* v. *New Hampshire Dep't of Corrections*, 301 F.3d 13, 19-22 (1st Cir.) (failure to accommodate medical, sanitary,

zation of individuals with mental disabilities[3] provide other examples. As this Court recently made clear in *Nevada Department of Human Resources* v. *Hibbs*, No. 01-1368 (May 27, 2003), slip op. 12-13, Congress has substantially greater leeway when, as in Title II, it enforces constitutional principles that involve a "heightened level of scrutiny" of state conduct.

Second, there is a much greater "history and pattern" of violations of the constitutional rights of individuals with disabilities, *Garrett*, 531 U.S. at 368, in the public services context addressed by Title II than in the employment context addressed by Title I. The *Garrett* Court itself recognized that the "overwhelming majority" of examples of state disability discrimination presented to the congressionally created fact-finding task force involved public services. *Id.* at 371 n.7.[4]

---

and safety-related needs of prisoner with Amyotrophic Lateral Sclerosis violates both the Cruel and Unusual Punishments Clause and ADA Title II), vacated on grant of reh'g en banc, 310 F.3d 785 (1st Cir. 2002).

[3] Compare *Olmstead* v. *L.C.*, 527 U.S. 581, 587 (1999) (holding that Title II prohibits unnecessary institutionalization of individuals with mental disabilities when, *inter alia*, "the State's treatment professionals have determined that community placement is appropriate") with *Youngberg* v. *Romeo*, 457 U.S. 307, 324 (1982) (institutionalized persons with disabilities have Due Process right to freedom from restraint "except when and to the extent professional judgment deems this necessary to assure such safety or to provide needed training").

[4] The Court suggested that the record of state violations of the constitutional rights of individuals with disabilities might also have related to matters covered by Title III, the ADA's public accommodations title. See *Garrett*, 531 U.S. at 371 n.7. But Title III by its terms covers only "private entities." 42 U.S.C. 12181(7). To the extent that states violated the constitutional rights of individuals with disabilities outside of the employment context, it is Title II that responds to those violations. See *id.* 12132 (Title II provision

And although Congress tellingly omitted any mention of *governmental* employment discrimination from its statutory findings, see *id.* at 371, Congress expressly found that "discrimination against individuals with disabilities persists in such critical areas as * * * access to public services." 42 U.S.C. § 12101(a)(3). Finally, unlike in the employment context, examination of judicial decisions reveals "extensive litigation and discussion of the constitutional violations," *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring), in the public services context. See Brief for the United States, *Medical Board of California* v. *Hason*, No. 02-479, at 1a-8a (listing more than 60 "[c]ases [e]videncing [u]nconstitutional [t]reatment of [i]ndividuals with [d]isabilities").

A number of circuits, recognizing these key distinctions between Titles I and II of the ADA, have held that Title II is, in whole or in part, proper Section 5 legislation. See *Hason* v. *Medical Bd.*, 279 F.3d 1167, 1170 (9th Cir. 2002), cert. dismissed, 123 S. Ct. 1779 (2003); *Garcia* v. *S.U.N.Y. Health Sciences Center*, 280 F.3d 98, 111-12 (2d Cir. 2001); *Popovich*, 276 F.3d at 813-16; see also *Kiman*, 301 F.3d at 24 (panel opinion, currently pending on rehearing *en banc*). A number of other circuits, by contrast, have ignored these distinctions and held that Title II was not a proper exercise of Congress's Section 5 authority. See *Wessel* v. *Glendening*, 306 F.3d 203, 215 (4th Cir. 2002); *Klingler* v. *Director, Dep't of Revenue*, 281 F.3d 776, 777 (8th Cir. 2002) (per curiam); *Thompson* v. *Colorado*, 278 F.3d 1020, 1034 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002); *Reickenbacker* v. *Foster*, 274 F.3d 974, 983 (5th Cir. 2001); *Walker* v. *Snyder*, 213 F.3d 344, 347 (7th Cir. 2000), cert. denied, 531 U.S. 1190 (2001). This conflict in the circuits is deep and persistent, and this case squarely implicates it. The Court should grant certiorari to resolve the conflict and make clear that Ti-

---

broadly prohibiting any public entity from "subject[ing]" a qualified individual with a disability to "discrimination").

tle II is, whether as a whole or as applied here, proper Section 5 legislation.

II. This Case Implicates The Conflict Over Whether Section 5 Challenges To ADA Title II Must Be Evaluated In A Facial Or An As-Applied Manner

This case also directly implicates a second conflict in the circuits. The Sixth Circuit held that even if Title II exceeds Congress's Section 5 authority in some of its applications, the statute must nonetheless be upheld as applied to cases in which individuals with disabilities invoke it to obtain redress for violations of constitutional rights guaranteed by the Fourteenth Amendment's Due Process Clause. Pet. App. 3; see also *Popovich*, 276 F.3d at 811-16 (holding that Title II was a proper exercise of Congress's authority to enforce the Due Process Clause as applied to require that hearing-impaired parent be provided hearing assistance in child custody proceeding). The Second Circuit has similarly employed an as-applied analysis in holding that Title II can be upheld as proper Section 5 legislation when it is applied to cases where the state's action "was motivated by either discriminatory animus or ill will due to disability," even if it cannot be upheld as applied to a case involving a mere failure to provide reasonable accommodation. *Garcia* v. *S.U.N.Y. Health Sciences Center*, 280 F.3d 98, 111-12 (2001). And a panel of the First Circuit has held that Title II may be upheld as proper Section 5 legislation in any case in which the statute is invoked to provide a remedy for an actual violation of the plaintiff's constitutional rights. See *Kiman* v. *New Hampshire Dep't of Corrections*, 301 F.3d 13, 19-22, vacated on grant of reh'g en banc, 310 F.3d 785 (2002).

These holdings accord with the basic rules governing facial challenges to statutes. As this Court has emphasized, a "facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which

the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). The Court has twice applied that principle in the specific context of a claim that Congress has adopted a statute that exceeded the authority to enforce the Civil War Amendments. In both *United States* v. *Raines*, 362 U.S. 17, 20-26 (1960), and *Griffin* v. *Breckenridge*, 403 U.S. 88, 102-07 (1971), this Court held that if Congress had power to reach the specific facts alleged in the plaintiff's complaint, the statute must be upheld as applied to those facts even if the statute might have other applications that went beyond the legislature's enforcement authority. See also *Hibbs*, slip op. 3 (Scalia, J., dissenting) (stating that the *Salerno* principle applies to facial challenges to the Section 5 basis for a congressional enactment).

Disregarding these principles, three courts of appeals have refused to examine the constitutionality of Title II in an as-applied manner. They have instead held that the Section 5 basis for Title II must be established for the statute "as a whole." *Dare* v. *California*, 191 F.3d 1167, 1175-77 (9th Cir. 1999), cert. denied, 531 U.S. 1190 (2001); see also *Wessel* v. *Glendening*, 306 F.3d 203, 207-08 (4th Cir. 2002) (where plaintiff's claim "arises directly under Title II," rather than under a specific regulation implementing the statute, Section 5 analysis must consider Title II as a whole); *Thompson* v. *Colorado*, 278 F.3d 1020, 1028 n.4 (10th Cir. 2001) (holding that it is appropriate to "conduct the abrogation analysis by considering Title II in its entirety"), cert. denied, 535 U.S. 1077 (2002). The conflict between these decisions and the decisions holding that an as-applied analysis is appropriate is, like the basic conflict over the constitutionality of Title II, widespread and persistent.

This case squarely implicates the conflict over whether Section 5 analysis of Title II should proceed on a facial or an as-applied basis. Unlike some of the Title II cases in which petitions for certiorari have been filed in this Court, cf. *Thompson*, *supra* (plaintiffs challenged the state's imposition

of a $2.25 fee for receipt of a handicapped parking placard), this case involves an application of Title II that directly enforces core constitutional rights. Respondents Lane and Jones contend that the state violated Title II by operating a court system that "when viewed in its entirety" was "not readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a). Such an inaccessible court system threatens to violate numerous constitutional rights, including: the First Amendment right of citizens to petition the government for redress of grievances, which encompasses a "right of access to the courts," *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 525 (2002) (internal quotation marks omitted); the First Amendment right of the public to attend court proceedings, see *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 8-15 (1986); the Sixth Amendment rights of criminal defendants to be present at their trials and to have their trials open to the public, see *Waller* v. *Georgia*, 467 U.S. at 46 (right to public trial); *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975) (right to be present); and the guarantee under the Due Process and Equal Protection Clauses of the Fourteenth Amendment that full and meaningful access to important court proceedings will not be denied because of a litigant's poverty or other constitutionally irrelevant factor, see *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 124 (1996); *Boddie* v. *Connecticut*, 401 U.S. 371, 380-81 (1971). Even if any given individual with a disability who cannot attend a particular proceeding in an inaccessible courthouse might not experience a violation of his or her constitutional rights, the widespread inaccessibility of courthouses throughout the nation[5]—and the significant threat that inaccessibility poses to a range of constitutional rights—fully justifies Title II as "reasonably prophylactic legislation" in

[5] For examples of challenges to inaccessible courthouses, see *Shotz* v. *Cates*, 256 F.3d 1077, 1080-81 (11th Cir. 2001); *Layton* v. *Elder*, 143 F.3d 469, 472 (8th Cir. 1999); *Matthews* v. *Jefferson*, 29 F. Supp. 2d 525, 533-34 (W.D. Ark. 1998); *Kroll* v. *St. Charles County*, 766 F. Supp. 744, 752 (E.D. Mo. 1991).

this context. *Kimel* v. *Florida Board of Regents*, 528 U.S. 62, 88 (2000); see also *Hibbs*, slip op. 15 (reaffirming Congress's prophylactic Section 5 power).

And indeed, the plaintiffs in this case have alleged facts that, if established, would demonstrate that the state actually violated their Fourteenth Amendment rights. Respondents Lane and Jones were denied their constitutional right of access to a judicial proceeding simply because of the state's decision to hold court in inaccessible courthouses. The violation of respondent Lane's constitutional rights went even further, for the inaccessibility of the courtroom denied Lane his right as a criminal defendant to be present at proceedings involving the case against him. And Lane's Kafkaesque arrest for failure to appear at his pretrial hearing—a hearing that was held in an inaccessible second-floor courtroom in a building with no elevator—further deprived him of liberty without due process. This case thus directly presents the question whether Title II can be upheld as proper Section 5 legislation as applied to a case in which the plaintiff challenges state conduct that violated his or her constitutional rights.

III. This Case Presents the Important Question of What Constitutional Violations ADA Title II Must Seek to Remedy in Order Validly to Abrogate State Sovereign Immunity

This case also presents an opportunity to resolve the confusion that persists among those courts that have held that the Section 5 basis for Title II should be evaluated in an as-applied manner. The First Circuit panel held that Title II is proper Section 5 legislation as applied to any case in which the plaintiff challenges conduct that actually violated his or her constitutional rights. See *Kiman*, 301 F.3d at 24. But the Second and Sixth Circuits have artificially limited the circumstances in which the statute can be upheld as applied—though they have done so in different ways. The Second Circuit has ruled that the statute may be upheld only when it is applied to

state conduct that was motivated by "discriminatory animus or ill will due to disability"—conduct that the court believed violated the Equal Protection Clause. *Garcia*, 280 F.3d at 112. The Sixth Circuit, by contrast, has ruled that the statute can be upheld only when it enforces due process—and *not* equal protection—rights. See *Popovich*, 276 F.3d at 811-15.

Those limitations only confuse the issue. A statute must be upheld as proper enforcement legislation whenever Congress had power to reach the facts alleged in the plaintiff's complaint. See *Raines*, 362 U.S. at 20-26; *Griffin*, 403 U.S. at 102-07. Accordingly, Title II must be upheld as applied to any case in which the plaintiff challenges conduct that falls in either of two categories: (a) conduct that actually violated the plaintiff's constitutional rights; or (b) conduct that Congress may regulate to prevent a meaningful risk that constitutional rights will be violated. See *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997) (Section 5 gives Congress power to "remedy or prevent unconstitutional actions").

This case accordingly presents the Court an opportunity both to reaffirm that the ordinary rules governing facial challenges apply to claims that Congress has exceeded its Section 5 authority and to make clear that ADA Title II may be upheld whenever it provides a remedy for the violation of *any* right the Fourteenth Amendment guarantees to individuals with disabilities. The Court should accordingly grant certiorari and affirm the judgment of the Sixth Circuit, but it should not endorse the due process/equal protection distinction that appears in the Sixth Circuit's case law.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

Samuel R. Bagenstos
1545 Massachusetts Ave.
Cambridge, MA 02138

Thomas C. Goldstein
Goldstein & Howe, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

William J. Brown
(Counsel of Record)
William J. Brown & Assocs.
23 North Ocoee St.
Cleveland, TN 37364
(423) 476-4515

June 2, 2003

No. 02-1667

SEP 8 2003

In The Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

GEORGE LANE, BEVERLY JONES, and UNITED STATES OF AMERICA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX

MICHAEL E. MOORE
Solicitor General
STATE OF TENNESSEE
P.O. Box 20207
Nashville, Tennessee
37202-0207
(615) 741-3226
(615) 741-2009 (fax)
Counsel for Petitioner

WILLIAM J. BROWN
P.O. Box 1001
Cleveland, Tennessee
37364-1001
(423) 476-4515
(423) 476-2937 (fax)
Counsel for Respondents

THEODORE B. OLSON
Solicitor General
UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
Washington, D.C. 20530-0001
(202) 514-2217
(202) 514-9769 (fax)
Counsel for Respondents

Petition For Certiorari Filed May 12, 2003
Certiorari Granted June 23, 2003

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Civil Docket for Case No. 98-CV-731 1

Civil Docket for Case No. 98-6730 7

January 10, 2003, Amended Opinion of the Sixth Circuit Affirming the District Court's Denial of Tennessee's Motion to Dismiss and Remanding for Further Proceedings .....(Petition for Certiorari, App. 1)

November 10, 1998, Order of the District Court Denying Tennessee's Motion to Dismiss .....(Petition for Certiorari, App. 6)

September 23, 2002, Order of the Sixth Circuit Granting Petition for Rehearing and Withdrawing the Opinion and Judgment of July 16, 2002 .....(Petition for Certiorari, App. 8)

July 16, 2002, Opinion and Judgment of the Sixth Circuit Affirming the District Court's Denial of Tennessee's Motion to Dismiss and Remanding for Further Proceedings Consistent with *Popovich v. Cuyohoga County Court of Common Pleas* .....(Petition for Certiorari, App. 10)

August 10, 1998, Plaintiffs' Complaint .....(Petition for Certiorari, App. 12)

U.S. Court of Appeals for the Sixth Circuit
Civil Docket for Case No. 98-Cv-731

George Lane and Beverly Jones,
Respondents-Appellees

v.

State of Tennessee,
Petitioner-Appellant.

Docket Entries

Date	Proceeding
12/18/98	Civil Cases Docketed. Notice filed by Appellant State of Tennessee. Transcript needed: y ☐ (mcp)
	* * *
2/10/99	NOTICE of case involving a constitutional question when the United States is not a party, filed by S. Elizabeth Martin for Appellant TN. Notice filed pursuant to FRAP 44, challenging the consistutionality [sic] of the Americans With Disabilities Act, 42 U.S.C. Sections 12101 et seq. Certificate of service date 2/9/99 [98-6730] (mcp)
2/11/99	Letter sent to Officer of the Solicitor General, U.S. Department of Justice notifying of a constitutional question. (mcp)
2/16/99	Joint MOTION filed to consolidate for submission the following cases: 97-1751, 97-3587, 97-3933, 98-5765, 98-6701 & 97-6730. . Motion filed by S. Elizabeth Martin for Appellant TN, William J. Brown for Appellees Beverly Jones & Appellee George Lane. [98-6730] (mcp)

* * *

3/1/99 ORDER filed granting in part the motion to consolidate for submission [1884640-1] filed by Mary M. Collier in 98-6701, granting in part motion the [sic] to consolidate for submission [1892321-1] filed by S. Elizabeth Martin, William J. Brown in 98-6730. 98-6475, 98-6701 & 98-6730 are consolidated for submission to the court [98-6475, 98-6701, 98-6730] (mcp)

3/22/99 Intervenor MOTION to allow USA to intervene filed by Seth M. Galanter for Intervenor USA. Certificate of service date 3/19/99. [98-6475, 98-6701, 98-6730] (pje)

* * *

3/31/99 ORDER filed granting motion to intervene filed by Seth M. Galanter; GRANTING motion to file one consolidated brief by 4/7/99 filed by Seth M. Galanter. [98-6475, 98-6701, 98-6730] (pje)

* * *

4/20/99 APPENDIX filed by S. Elizabeth Martin for Appellant TN. Copies: 5. Certificate of service date 4/19/99 [98-6730] (ds)

* * *

4/28/99 FINAL BRIEF filed by William J. Brown for Appellees Beverly Jones, George Lane. Copies: 7. Certificate of service date 4/28/99. Number of Pages: 29. [98-6730] (ds)

5/4/99 FINAL BRIEF filed by S. Elizabeth Martin for Appellant TN. Copies: 7. Certificate of service date 5/3/99. Number of Pages: 65. [98-6730] (teb)

5/4/99 FINAL REPLY BRIEF filed by S. Elizabeth Martin for Appellant TN. Copies: 7 Certificate

of service date 5/3/99. Number of Pages: 25. [98-6730] (teb)

5/7/99 BRIEF filed by Seth M. Galanter for Intervenor USA. Copies: 7. Certificate of service date 5/3/99. Number of Pages: 34. [98-6475, 98-6701, 98-6730] (teb)

* * *

10/7/99 Intervenor MOTION filed to participate at oral argument and share the time allotted with plaintiffs. Motion filed by Seth M. Galanter for Intervenor USA in 98-6730. Certificate of service date 10/6/99. [98-6730] (mcp)

10/19/99 LETTER SENT by mcp granting motion to participate at oral argument and share time allotted to the plaintiffs, [2027506-1] motion filed by Seth M. Galanter for intervenor. [98-6730] (mcp)

* * *

10/21/99 NOTICE OF ADOPTION BY REFERENCE filed by Mary M. Collier for Appellant TN. Appellant adopts by reference the supplemental brief filed on behalf of the "State" in the cases of 98-5765, 97-3933, 97-3587 & 97-1751. Certificate of service date 10/20/99 [98-6730] (mcp)

10/26/99 CAUSE ARGUED on 10/26/99 by Seth M. Galanter for Intervenor USA in 98-6730, William J. Brown for Appellee Beverly Jones, Appellee George Lane in 98-6730, Mary M. Collier for Appellant TN in 98-6730 before Judges Martin, Suhrheinrich, Siler. [98-6730] (me)

1/31/00 Intervenor LETTER filed. Requesting that this court not order any supplemental briefing

until after the Supreme Court has issued its decision in Alsbrook and Dickson. [98-6730]. Letter from Seth M. Galanter for Intervenor USA in 98-6730. Certificate of service date 1/27/00 [98-6730] (mcp)

3/8/00 ADDITIONAL CITATION filed by Seth M. Galanter for Intervenor USA. Certificate of service date 3/7/00 [98-6701, 98-6730] (pje)

4/13/00 ADDITIONAL CITATION filed by Mary M. Collier for Appellant Middle TN St Univ in 98-6701, Mary M. Collier for Appellant TN in 98-6730. Certificate of service date 4/12/00 [98-6701, 98-6730] (mcp)

4/28/00 ORDER filed to hold case in abeyance pending Supreme Court disposition of Garrett [97-1751, 97-3587, 97-3933, 98-5765, 98-6701, 98-6730] Chief Judge Boyce F. Martin, Richard F. Suhrheinrich, Eugene E. Siler, Circuit Judges. (ert)

7/16/02 Per Curiam OPINION filed: AFFIRM the district court's denial of Tennessee's motion to dismiss and REMAND this case for further proceedings, decision not for publication pursuant to local rule 28(g). [98-6730] Boyce F. Martin, Chief Judge, Richard F. Suhrheinrich, Circuit Judge, Eugene E. Siler, Circuit Judge. (mcp)

* * *

8/29/02 PETITION for rehearing before original panel filed by S. Elizabeth Martin for Appellant TN. Certificate of service date 8/28/02. [98-6730] (mcp)

9/20/02 ORDER filed granting petition for rehearing before original panel [2607974-1] filed by S. Elizabeth Martin [98-6730]. The opinion and

judgment of 7/16/02 are hereby withdrawn, and the case is restored to the court's active docket. The parties are further instructed to file briefs not in excess of 25 pages addressing the issue as outlined in the petition for rehearing, with each side's brief to be filed not later than close of business on Wednesday, October 23, 2002. Upon the filing of the briefs the court will proceed to dispose of the case. [98-6730]. Boyce F. Martin, Chief Judge, Richard F. Suhrheinrich, Eugene E. Siler, Circuit Judges. (yh)

* * *

10/23/02 Supplemental brief on panel rehearing filed by S. Elizabeth Martin and Mary M. Collier for Appellant TN. Copies: 7. Certificate of service date 10/22/02. Number of Pages: [98-6730] (mcp)

10/23/02 Supplemental brief on panel rehearing filed by William J. Brown for Appellees Beverly Jones, George Lane. Copies: 7 Certificate of service date 10/22/02. Number of Pages: 38. [98-6730] (mcp)

* * *

11/7/02 Supplemental brief on panel rehearing filed by Sarah E. Harrington for Intervenor USA. Copies: 7. Certificate of service date 11/6/02. Number of Pages: 20. [98-6730] (mcp)

11/7/02 MOTION CAUSE SUBMITTED on briefs to panel consisting of Judges Martin, Suhrheinrich, Siler [98-6730] (max)

1/10/03 AMENDED OPINION filed: AFFIRM the decision of the district court and REMAND for further proceedings consistent with the opinion of this court. Decision for publication pursuant to local rule 206 [98-6730]. Boyce F. Martin, Authoring Circuit Judge, Richard F.

Suhrheinrich, Circuit Judge, Eugene E. Siler, Circuit Judge. (jmb)

1/10/03 AMENDED JUDGMENT: the district court's denial of defendant State of Tennesssee's motion to dismiss is AFFIRMED, and the case is REMANDED for further proceedings consistent with the opinion of this court. (jmb)

1/16/03 Appellant MOTION filed to stay issuance of the mandate pending the filing of a petition for writ of certiorari. Motion filed by S. Elizabeth Martin for Appellant TN. Certificate of service date 1/15/03 [98-6730] (mcp)

1/28/03 ORDER filed granting motion to stay mandate [2678422-1] filed by S. Elizabeth Martin. The mandate shall be stayed as set forth in 6 Cir. Rule 41(c). [98-6730] Boyce F. Martin, Chief Judge, Richard F. Suhrheinrich, Circuit [sic] Eugene E. Siler, Circuit Judge. (mcp)

3/4/03 U.S. Supreme Court letter filed: extension of time within which to file a petition for a writ of certiorari granted to and including 05-12-03 [2703515-1]. [98-6730] (swh)

5/19/03 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant TN. Filed in the Supreme Court on 05-12-03, Supreme Ct. case number: 02-1667. [98-6730] (swh)

6/27/03 U.S. Supreme Court letter filed: GRANTING petition for writ of certiorari limited to Question 1 presented by the petition [2747105-1] filed by TN [98-6730]. Filed in the Supreme Court on 06-23-03. (swh)

U.S. District Court Middle District of Tennessee (Nashville)
Civil Docket for Case No. 98-Cv-731

George Lane and Beverly Jones, Plaintiffs

v.

State of Tennessee, et. al. Defendants.

Docket Entries

Date	No.	Proceedings
8/10/98	1	COMPLAINT (Summons(es) issued) Filing fee paid in the amount of: $150.00 Receipt # 64591 (bbj) [Entry date 08/18/98]
		* * *
10/5/98	36	MOTION by deft State of Tennessee to dismiss (tlc)
10/5/98	37	MEMORANDUM by deft State of Tennessee in support of motion to dismiss [36-1] (tlc)
		* * *
10/9/98	40	COMPLAINT – CLASS ACTION [1-1] by pltfs (tlc) [Entry date 10/13/98]
		* * *
11/6/98	61	RESPONSE by pltf to motion to dismiss [36-1] (tlc) [Entry date 11/09/98]
11/10/98	62	ORDER by Judge Thomas A. Higgins denying deft State of TN's motion to dismiss [36-1] (cc: all counsel) (EOD 11/12/98) (tlc) [Entry date 11/12/98]

* * *

11/25/98 71 MOTION by deft Tennessee State of to extend time to 12/7/98 to answer (tlc) [Entry date 11/30/98]

11/30/98 72 ORDER by Judge Thomas A. Higgins granting deft State of TN's motion to extend time to close of business on 12/7/98 to answer complaint [71-1] (cc: all counsel) (EOD 12/1/98) (tlc) [Entry date 12/01/98]

12/2/98 73 NOTICE OF APPEAL by deft Tennessee State of from Dist. Court decision [62-1] (mg) [Entry date 12/03/98]

* * *

12/7/98 75 MOTION by deft State of Tennessee to stay pending appeal and memorandum of law in support thereof (mg) [Entry date 12/08/98]

* * *

12/17/98 78 RESPONSE by pltfs to motion to stay pending appeal [75-1] with Exh A attached (mg) [Entry date 12/18/98]

12/17/98 79 MOTION by pltfs for class certification (mg) [Entry date 12/18/98]

12/17/98 80 RESPONSE by deft State of TN to motion to stay pending appeal [75-1] (mg) [Entry date 12/18/98]

12/17/98 81 MOTION by Dennis Cantrel, Ann Marie Zappola and Ralph E. Ramsey, Sr. for joinder in complaint (mg) [Entry date 12/18/98]

* * *

12/29/98 87 ORDER by Judge Thomas A. Higgins granting motion to stay pending appeal [75-1] (cc: all counsel) EOD 12/29/98 (mg)

12/29/98 88 ORDER by Judge Thomas A. Higgins denying as moot motion for class certification [79-1] pending the outcome of the state's appeal. (cc: all counsel) EOD 12/29/98 (mg)

12/29/98 89 ORDER by Judge Thomas A. Higgins denying as moot motion for joinder in complaint [81-1] pending the outcome of the State's appeal (EOD 12/29/98) (cc: all counsel) (mg)

2/22/99 90 MOTION by pltfs Dennis Cantrel, Ann Marie Zappola, Ralph E. Ramsey to reconsider denial of motion for permissive joinder (mg) [Entry date 02/23/99]

3/26/99 91 ORDER by Judge Thomas A. Higgins granting motion to reconsider denial of motion for permissive joinder [90-1] vacating [89-1] order granting motion for joinder in complaint [81-1] (cc: all counsel) EOD 3/29/99 (mg) [Entry date 03/29/99]

* * *

7/7/03 108 ORDER by Judge Todd J. Campbell: Motion to reimpose the stay for all proceedings in this case [106-1] is granted in part and denied in part. The case is stayed as to the State of TN due to the interlocutory appeal before the Supreme Court. The parties have failed to carry their burden for a stay, and further delay in this nearly five year old case, as to the other defts. Accordingly, the motion for a stay as to all the County Defts is denied. Pursuant to FRCP,

all claims against State of TN are severed and shall be proceeded with separately. A separate trial as to the State of TN will be set by separate Order at the conclusion of the appeal before the Supreme Court. Case Management Conference set for 1:00 on 7/18/03; Jury trial set for 9:00 on 3/9/04; pretrial conference set 9:00 on 3/1/04. (EOD 7/7/03) (cc: all counsel) (km)

* * *

7/18/03 110 MOTION by A. Russell Larson for permissive joinder & complaint (vm)

7/22/03 111 ORDER by Magistrate Judge Juliet E. Griffin: A Case Management Conference was held 7/18/03; Discovery deadline 1/15/04; Dispositive motion filing deadline 11/10/03; any response to any dispositive motion shall be filed by 12/10/03; pltfs' motion for permissive joinder & complaint [110-1] is granted; the Clerk is directed to add A. Russell Larson as a pltf in this case; defts shall have until 7/23/03 to file any motion related to the stay or the trial date; pltfs shall have until 9/19/03 to file a renewed motion for class certification; defts shall have until 10/19/03 to file a response to the motion; the Clerk is directed to forward the file in this case to Judge Campbell for his consideration of the pltfs' motion to reconsider [109-1]; Terminating case referral to Magistrate Judge Juliet E. Griffin. (cc: all counsel) EOD 7/22/03 (vm)

* * *

Supreme Court, U.S.
FILED
SEP 8 2003
OFFICE OF THE CLERK

(5)

No. 02-1667

In The Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

GEORGE LANE, BEVERLY JONES, and UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF PETITIONER

PAUL G. SUMMERS
Attorney General & Reporter
for the State of Tennessee
MICHAEL E. MOORE*
Solicitor General
**Counsel of Record*
S. ELIZABETH MARTIN
MARY MARTELLE COLLIER
Senior Counsel
OFFICE OF THE ATTORNEY GENERAL
& REPORTER FOR THE STATE
OF TENNESSEE
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-3226

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

66 pp

QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131–12165 (2002), exceeds Congress' authority under section 5 of the Fourteenth Amendment, thereby failing validly to abrogate the States' Eleventh Amendment immunity from private damages claims.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	11
ARGUMENT	15
TITLE II OF THE ADA EXCEEDS CONGRESS' POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT TO ABROGATE THE SOVEREIGN IMMUNITY OF THE STATES	15
A. Title II was not enacted in response to evidence of a widespread pattern of state action violating the Fourteenth Amendment rights of the disabled	18
1. The legislative record fails to document a pattern of irrational discrimination by the States against the disabled	19
2. The legislative record likewise fails to document a pattern of state action violating the due process rights of the disabled	24

TABLE OF CONTENTS – Continued

	Page
B. Title II is not congruent with or proportional to an appropriate remedial objective authorized by section 5 of the Fourteenth Amendment	27
1. Title II's indiscriminate scope and extra-constitutional remedial scheme are not tailored to cure violations of the Fourteenth Amendment rights of the disabled	29
2. Title II is not sustainable as prophylactic legislation needed to deter constitutional violations by the States	35
CONCLUSION	37
Appendix A	App. 1
Appendix B	App. 8
Appendix C	App. 9

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706 (1999) 16

Alexander v. Choate, 469 U.S. 287 (1985) 33

Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (en banc), *cert. dismissed*, 529 U.S. 1001 (2000) 29

Barnes v. Gorman, 536 U.S. 181 (2002) 6, 33

Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001) ..... *passim*

Boddie v. Connecticut, 401 U.S. 371 (1971) 25

Bush v. Gore, 531 U.S. 98 (2000) 25

City of Boerne v. Flores, 521 U.S. 507 (1997) ..... *passim*

The Civil Rights Cases, 109 U.S. 3 (1883) 27

City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) 12, 19, 20, 23, 35

Douglas v. California Dep't of Youth Auth., 271 F.3d 812 (9th Cir. 2001), *cert. denied*, 536 U.S. 924 (2002) 36

Federal Mar. Comm'n v. South Carolina State Ports Auth., 535 U.S. 743 (2002) 16

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) 17, 18, 30, 31

Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn, 280 F.3d 98 (2d Cir. 2001) 32, 36

Heller v. Doe, 509 U.S. 312 (1993) 19

TABLE OF AUTHORITIES – Continued

Page

Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000) (en banc), *cert. denied sub nom. Arkansas Dep't of Educ. v. Jim C.*, 533 U.S. 949 (2001) 36

Johnson v. City of Saline, 151 F.3d 564 (6th Cir. 1998) 29

Jones v. Helms, 452 U.S. 412 (1981) 25

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) ... *passim*

Koslow v. Commonwealth of Pa., 302 F.3d 161 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 1353 (2003) 36

Lawrence v. Texas, 123 S. Ct. 2472 (2003) 25

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 19

Mathews v. Lucas, 427 U.S. 495 (1976) 34

Nihiser v. Ohio Envtl. Prot. Agency, 269 F.3d 626 (6th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002) 36

Nevada Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003) 12, 18, 27, 30, 35

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) 25

Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808 (6th Cir.), *cert. denied*, 537 U.S. 812 (2002) 10, 11

Reickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001) 36

Robinson v. Kansas, 295 F.3d 1183 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 2574 (2003) 36

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 11, 12, 16, 17

TABLE OF AUTHORITIES – Continued

Page

Shepard v. Irving, No. 02-1712, 2003 WL 21977963 (4th Cir. Aug. 20, 2003) 36

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 30

Thompson v. Colorado, 278 F.3d 1020 (10th Cir. 2001), *cert. denied*, 535 U.S. 1077 (2002) 31

United States v. Carolene Prod. Co., 304 U.S. 144 (1938) 34

Washington v. Glucksberg, 521 U.S. 702 (1997) 25

Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002) 23

Ex parte Young, 209 U.S. 123 (1908) 16

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XI 9, 10, 12

U.S. CONST. amend. XIV §§ 1, 5 ..... *passim*

FEDERAL STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) 1

29 U.S.C. § 701 36

29 U.S.C. § 794a 6

42 U.S.C. § 2000a-3(a) 33

42 U.S.C. § 12101(a)(1)-(9) 20

42 U.S.C. § 12101(a)(3) 26

42 U.S.C. § 12101(a)(7) 34

42 U.S.C. § 12101(b)(1) 19

42 U.S.C. § 12101(b)(4) 17

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 12131(1) 3

42 U.S.C. § 12131(2) 3, 31

42 U.S.C. § 12132 ..... *passim*

42 U.S.C. § 12133 6

42 U.S.C. § 12134 ..... 2, 3, 4

42 U.S.C. §§ 12131–12165 3

42 U.S.C. §§ 12141–12165 3

42 U.S.C. § 12188(a)(1) 33

42 U.S.C. § 12188(b) 33

42 U.S.C. § 12201(a) 32

42 U.S.C. § 12202 ..... 2, 12, 17

42 U.S.C. § 12205 6

29 C.F.R. §§ 35.101–.190 (2002) 4

29 C.F.R. § 35.130(b)(1)(iii) 5

29 C.F.R. § 35.130(b)(3)(i) 5, 32

29 C.F.R. § 35.130(b)(3)(ii) 5

29 C.F.R. § 35.130(b)(4)(i) 5, 32

29 C.F.R. § 35.130(b)(6) 5

29 C.F.R. § 35.130(b)(7) 4, 5, 32

29 C.F.R. § 35.130(b)(8) 5, 6, 32

29 C.F.R. § 35.130(d) 4

29 C.F.R. § 35.130(f) 5

29 C.F.R. § 35.150 4

29 C.F.R. § 35.150(a)(3) 6

TABLE OF AUTHORITIES – Continued

Page

29 C.F.R. § 35.151(a) 4

29 C.F.R. § 35.151(e) 4

STATE STATUTES

TENN. CODE ANN. § 8-50-103 (2002 Repl.) 16

TENN. CODE ANN. § 8-50-104 (2002 Repl.) 16

TENN. CODE ANN. §§ 68-120-201–205 (2001 Repl.) 16

MISCELLANEOUS

SUP. CT. R. 32 8

FED. R. APP. P. 44(a) 9

136 CONG. REC. H2614 (daily ed. May 22, 1990) (Statement of Rep. Berman) 22

H.R. REP. NO. 101-485(IV), 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 512 21

S. REP. NO. 101-116, 101st Cong., 1st Sess. (1989) 21, 22, 26

U.S. Dep't of Justice, The Americans with Disabilities Act: Title II Technical Assistance Manual (1993) 29, 30

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1-5) is reported at 315 F.3d 680 (6th Cir. 2003). The original opinion of the court of appeals (Pet. App. 10-11) and the order of the district court denying petitioner's motion to dismiss (Pet. App. 6-7) are unreported.

JURISDICTION

The initial judgment of the court of appeals was entered on July 16, 2002. A timely petition for rehearing was filed on August 29, 2002. The petition for rehearing was granted, and the court of appeals entered an amended opinion on January 10, 2003. Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including May 12, 2003, and on that date petitioner filed its petition. On June 23, 2003, this Court granted the petition, limited to the first question presented. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> Section 1: . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

> Section 5: The congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV. The Eleventh Amendment is set out verbatim in the petition. (Pet. 2)

Title II of the Americans with Disabilities Act of 1990 ("ADA") provides in part:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

The abrogation provision of the ADA provides:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S.C. § 12202.

Other relevant provisions of Title II, together with relevant portions of the regulations promulgated by the Attorney General to implement Title II, *see* 42 U.S.C.

§ 12134, are reproduced in Appendices A and C of this brief.

STATEMENT OF THE CASE

1. Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12131–12165, comprehensively regulates all services, programs and activities conducted by a "public entity," defined to include the States and their departments, agencies and instrumentalities. 42 U.S.C. § 12131(1). Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The statute defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). Thus, Title II does not simply prohibit the States from making distinctions based upon disabilities but affirmatively requires that public entities make reasonable modifications for disabled persons who qualify. Title II also prohibits discrimination in public transportation and affirmatively requires public entities to provide handicap access in most such facilities. 42 U.S.C. §§ 12141–12165.

Pursuant to congressional directive, *see* 42 U.S.C. § 12134, the Attorney General has promulgated regulations to implement Title II. 29 C.F.R. §§ 35.101–.190 (2002). The implementing regulations require public entities, among other things:

- to locate, design, and construct all new facilities in such a manner that they are "readily accessible to and usable by individuals with disabilities . . . ," 29 C.F.R. § 35.151(a);
- to incorporate curb ramps at all intersections of newly constructed streets, roads, and highways to accommodate disabled persons, 29 C.F.R. § 35.151(e);
- to modify existing buildings and roadways when necessary to insure that programs and services are accessible to individuals with disabilities, 29 C.F.R. § 35.150;
- to "administer services, programs, and activities in the most integrated setting appropriate to the needs of . . ." the disabled, 29 C.F.R. § 35.130(d); and,
- to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability . . . ," 29 C.F.R. § 35.130(b)(7).

The regulations forbid public entities from:

- utilizing criteria, including facility site selection criteria, in the administration of programs and services that "have the effect of subjecting qualified individuals with disabilities to discrimination" or of "impairing accomplishment of the objectives of the . . . program with respect to individuals with disabilities . . . ," 29 C.F.R. §§ 35.130(b)(3)(i)-(ii) & 35.130(b)(4)(i);

- imposing eligibility criteria "that screen out or tend to screen out" disabled persons "from fully and equally enjoying any service, program, or activity . . . ," 29 C.F.R. § 35.130(b)(8);
- administering licensing and certification programs "in a manner that subjects . . . [disabled persons] to discrimination . . . ," 29 C.F.R. § 35.130(b)(6);
- providing the disabled with "an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others," 29 C.F.R. § 35.130(b)(1)(iii); and,
- charging disabled persons "to cover the costs of measures . . . required to provide . . . the nondiscriminatory treatment required by the . . . [ADA or implementing regulations]." 29 C.F.R. § 35.130(f).

A State may avoid its obligation to modify policies, practices and procedures having discriminatory effects only if it "can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 29 C.F.R. § 35.130(b)(7). A State may avoid its obligation to modify existing physical facilities when the modification is necessary to eliminate discriminatory effects only if it can demonstrate that the modification would cause "a fundamental alteration in the nature of the service, program, or activity" conducted there *or* "undue financial and administrative burdens . . . after

considering all resources available for use in the funding and operation of the service, program, or activity . . . ." 29 C.F.R. § 35.150(a)(3). A State may avoid its obligation to eliminate screening criteria that have a discriminatory effect only if it can demonstrate that such criteria are "necessary for the provision of the service, program, or activity being offered." 29 C.F.R. § 35.130(b)(8).

Anyone aggrieved by discrimination in violation of Title II may bring an action against the offending public entity and is entitled to the same "remedies, procedures, and rights" as those allowed under the Rehabilitation Act of 1973, 29 U.S.C. § 794a. 42 U.S.C. § 12133. Compensatory damages and injunctive relief are available in such actions; punitive damages are not. *Barnes v. Gorman*, 536 U.S. 181 (2002). A prevailing party may be awarded attorneys' fees. 42 U.S.C. § 12205.

2. Respondents George Lane and Beverly Jones filed this suit on August 10, 1998, in the United States District Court for the Middle District of Tennessee against the State of Tennessee ("petitioner") and several Tennessee counties charging them with violations of Title II and its implementing regulations. Specifically, Lane, a paraplegic, alleged that petitioner and Polk County had "discriminated against [him on account of his disability] . . . in that they . . . excluded him from participation in, or denied him the benefits of, the services of its [sic] court systems in violation of 42 U.S.C. [§] 12132" in connection with criminal charges brought against him in 1996 and 1997. (Pet. App. 23)

According to the Complaint, at his initial appearance on those charges in the General Sessions Court, Lane "was required to crawl up two flights of stairs" to the courtroom

on the second floor of the Polk County Courthouse in Benton, Tennessee, because there was no elevator. (Pet. App. 15) The Complaint does not disclose whether Lane requested to have his hearing conducted in an accessible location. Likewise, the Complaint does not state whether he sought assistance from anyone to reach the courtroom on this occasion, nor does it allege that anyone refused him such assistance.

On the day of his next scheduled appearance, Lane sent word to the judge that he would not crawl up the stairs to the courtroom. (Pet. App. 15) When officers were dispatched to the ground floor to help him up the stairs, he refused their assistance and refused to appear in the courtroom. (Pet. App. 15) Accordingly, the court issued an attachment for his arrest. (Pet. App. 15) Upon his release from custody, Lane retained counsel and thereafter "attended court proceedings by waiting downstairs from the courtroom and having his attorney shuttle back and forth with information concerning his case." (Pet. App. 15-16) On February 24, 1997, the court conducted Lane's preliminary hearing in the courthouse library, which was fully accessible to handicapped persons, over Lane's objection that the library was "a location that was not regularly frequented by the public." (Pet. App. 16) His case was bound over to the grand jury, which indicted him on two misdemeanor charges. (Pet. App. 16)

At his arraignment on these charges on March 17, 1997, Lane's counsel appeared on his behalf and informed the court that Lane "was on the first floor of the courthouse and could not come to the courtroom because of the requirement to climb the stairs to the courtroom." (Pet. App. 16) According to the Complaint, counsel then moved to continue the arraignment until such time as the courthouse

could be made to conform to the requirements of the ADA. (Pet. App. 16) The court denied the motion and set the case for trial.[1] (Pet. App. 16) Lane unsuccessfully prosecuted an extraordinary interlocutory appeal of the trial court's order to the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court. (Pet. App. 16-17) Thereafter, Circuit Court Judge Carroll Ross entered an order staying all criminal proceedings in the Polk County Courthouse until an elevator was installed. (Pet. App. 17) Construction of the elevator was completed in June 1998. (Pet. App. 17)

The Complaint further alleged that respondent Beverly Jones, a certified court reporter, is a paraplegic confined to a wheelchair as a result of injuries received in an automobile accident in 1989. (Pet. App. 19) She has an active practice and "is called upon by attorneys and other

[1] Pursuant to Rule 32 of the Rules of the Supreme Court, petitioner has submitted to the Clerk a request to lodge certified copies of the following public documents on file in the Tennessee Supreme Court Clerk's Office: a verbatim transcript of the March 17, 1997, hearing; Lane's "Motion to Dismiss Indictment or in the Alternative to Continue Arraignment;" the trial court's order denying that motion; and the orders of the Tennessee Court of Criminal Appeals and Tennessee Supreme Court disposing of Lane's extraordinary interlocutory appeal of the trial court's order. These materials disclose that, before ruling on Lane's motion, the trial court offered (1) to send two sheriff's deputies to the ground floor to help Lane up the stairs to the courtroom and (2) to conduct all further proceedings in the case in a handicapped-accessible room on the first floor of the courthouse in Benton or in a handicapped-accessible courthouse in nearby Ducktown. The trial judge also repeatedly asked for suggestions for accommodations from Lane's counsel. Lane refused these offers of accommodation and refused to suggest any other reasonable option. These materials further disclose that the relief sought by Lane was not merely a continuance of his arraignment but an outright dismissal of the indictment on account of the architectural deficiencies in the Polk County Courthouse.

parties to work all over Middle Tennessee . . . for the purposes of recording proceedings before the state courts . . . ." (Pet. App. 19) Because the courthouses in some of the counties where she offers her services fail to comply with the accessibility requirements of the ADA, she "has lost work and an opportunity to participate in the judicial process because of her inability to gain access to . . . [those] courthouses." (Pet. App. 20) As a consequence, respondent Jones charged that petitioner and these counties have "discriminated against . . . [her] in that they have excluded her from participating in the services offered by the courthouses and access to the Court proceedings . . . by failing to eliminate physical obstacles to her participation" in violation of Title II of the ADA. (Pet. App. 23)

Respondent Lane sought money damages for humiliation and embarrassment in an amount not to exceed $100,000. (Pet. App. 27) Respondent Jones sought money damages for humiliation and embarrassment and lost income in an amount not to exceed $250,000. (Pet. App. 27) Respondents also requested that the district court order petitioner and the counties named as defendants to bring the courthouses in question into compliance with Title II. (Pet. App. 28)

3. Petitioner moved to dismiss the claims against it on the ground that the Eleventh Amendment protects it from private suits for money damages under Title II. (Pet. App. 6) By order entered November 10, 1998, the district court denied the motion without comment (Pet. App. 7), and petitioner appealed that order to the United States Court of Appeals for the Sixth Circuit. (J.A. 1 & 8) On February 10, 1999, pursuant to Rule 44(a), FED. R. APP. P., petitioner notified the clerk that the case involved a constitutional

challenge to a federal statute. (J.A. 1) The Sixth Circuit granted the United States leave to intervene to defend the constitutionality of Title II on March 31, 1999. (J.A. 2)

On January 10, 2002, the Sixth Circuit, sitting en banc, decided *Popovich v. Cuyahoga County Court of Common Pleas,* 276 F.3d 808 (6th Cir.), *cert. denied,* 537 U.S. 812 (2002), in which the sharply divided court concluded, based on *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), "that congressional authority under section 5 [of the Fourteenth Amendment] to enforce the Equal Protection Clause is limited and will not sustain the Disabilities Act as an exception to Eleventh Amendment state immunity." 276 F.3d at 812. The Sixth Circuit, however, distinguished between Title II claims sounding in equal protection principles and those sounding in due process principles and held that the latter category of claims is not barred by the Eleventh Amendment. *Id.* at 813-16.

On July 16, 2002, a panel of the court of appeals issued a per curiam order affirming the district court's denial of petitioner's motion to dismiss respondents' claims. (Pet. App. 10) Concluding, based on *Popovich,* "that the Eleventh Amendment does not bar Title II claims against state entities that are based upon Fourteenth Amendment due process principles," the panel determined that respondents' Title II claims were not barred "[b]ecause . . . [they are] based on such due process principles." (Pet. App. 11) On August 29, 2002, petitioner sought a panel rehearing, arguing that *Popovich* should not control because the Complaint, properly analyzed, did not allege due process violations. (Pet. App. 8) On January 10, 2003, the panel issued an amended opinion affirming the decision of the district court and remanding the case for

further proceedings. (Pet. App. 1) Noting that "[a]mong the rights protected by the Due Process Clause of the Fourteenth Amendment is the right of access to the courts" (Pet. App. 3), the court, without citation to authority, asserted that "[t]he evidence before Congress when it enacted Title II of the . . . [ADA] established that physical barriers in government buildings, including courthouses and in the courtrooms themselves, have had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause." (Pet. App. 3-4) The panel therefore concluded that Congress enacted Title II as an appropriate means "'to guarantee meaningful enforcement' of the constitutional rights of the disabled," including "the right of access to the courts." (Pet. App. 4, quoting *Popovich*, 276 F.3d at 815-16)

Addressing respondents' particular claims, the panel decided that both sought to redress "due process-type" violations of Title II: "Jones and Lane are seeking to vindicate their right of access to the courts in Tennessee. Lane alleges that he has been denied the benefit of access to the courts. Jones similarly alleges that she has been excluded from courthouses and court proceedings by an inability to access the physical facilities." (Pet. App. 5) The panel declined to answer petitioner's contention that respondents' allegations, particularly those made by Jones, were based on equal protection principles. (Pet. App. 5)

SUMMARY OF THE ARGUMENT

In *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), this Court held that in order to achieve a valid

abrogation of the States' sovereign immunity from private suits for money damages: (1) Congress must have "unequivocally expresse[d] its intent to abrogate the immunity . . ."; and (2) Congress must have acted "pursuant to a valid exercise of power." *Id.* at 55 (internal quotations and citations omitted). After *Seminole Tribe*, section 5 of the Fourteenth Amendment is the only source of congressional power sufficient to abrogate the States' Eleventh Amendment sovereign immunity. *Id.* at 59-66. While Congress clearly stated its intent to abrogate in the text of the ADA, 42 U.S.C. § 12202, Title II of the ADA exceeds Congress' section 5 powers.

A. Title II is first and foremost equal protection legislation designed to eliminate discrimination against disabled persons in the "services, programs, or activities" of state and local governments. 42 U.S.C. § 12132. State action taken on the basis of disability is presumptively constitutional under the Equal Protection Clause and is subjected to minimum rational-basis scrutiny. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985). When Congress seeks to invoke its section 5 powers to enforce the Fourteenth Amendment's protections against irrational discrimination, it must base such action on evidence of a "widespread and persisting deprivation of constitutional rights" by the States. *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997). *Accord Nevada Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1982 (2003).

The legislative record developed in connection with the enactment of the ADA wholly fails to demonstrate any persisting pattern of unconstitutional discrimination against disabled persons by the States. The official congressional findings set forth in the text of the ADA make no reference to constitutional violations. Those findings do

not even refer to the States. Nor do the House and Senate Reports on the ADA contain the slightest hint that Congress was responding to evidence of widespread equal protection violations by the States against the disabled in their services and programs. Indeed, far from indicating concerns about unconstitutional behavior, the record recognizes the States' leadership in safeguarding the rights of the disabled. Likewise, the information presented to Congress by the Task Force on the Rights and Empowerment of Americans with Disabilities fails to document a pattern of irrational exclusion of the disabled from participation in state programs and services.

Nor can Title II be sustained on the theory that it was needed to enforce the due process rights of the disabled against state infringement. All citizens enjoy a panoply of fundamental constitutional rights protected by the Fourteenth Amendment's due process guarantee. But there is nothing in the legislative record to suggest that Congress was acting to protect due process rights, and no substantial evidence was presented to Congress that the States were engaged in a pattern of violations of the fundamental rights of the disabled.

B. Even if the legislative record had documented instances of unconstitutional treatment of the disabled by the States, Title II's sweeping provisions, the vast majority of which operate to prohibit entirely constitutional conduct, are "so out of proportion to a supposed remedial or preventive object that . . . [Title II] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532. Title II shares all of the incongruent and disproportionate features of Title I of the ADA that led this Court in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356

(2001), to decide that Title I exceeded Congress' section 5 authority. While as a general rule States are not required to make special accommodations for the disabled by the Fourteenth Amendment, the entire thrust of Title II is to require them to do just that. In addition, although the Fourteenth Amendment presumes that a failure to make such accommodations is permissible, Title II presumes the contrary and casts upon the States the burden to justify any such failure to act. And Title II prohibits virtually every state action that has an unintended adverse, disparate effect on disabled persons' access to state services and programs, without regard to whether the action is rationally related to legitimate goals. All of these features demonstrate that Title II was calculated to accomplish precisely what section 5 forbids – "a substantive redefinition" of the States' obligations under the Fourteenth Amendment. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000).

Neither is Title II sustainable as prophylactic legislation, needed to deter future constitutional violations by the States. Because there was no record of a pattern of existing unconstitutional treatment by the States of persons with disabilities, Congress had no reason to believe that broad prophylactic legislation was necessary in this field. Moreover, this was not a situation where previous legislative attempts to curb unconstitutional behavior by the States had failed. Indeed, the legislative record indicates that it was the very success of the Rehabilitation Act of 1973, which addressed the needs of disabled persons in connection with programs and services of recipients of federal funds, that led Congress to expand the Rehabilitation Act's access requirements through the ADA to all state activities as well as to the private sector. Finally, the sheer

breadth of Title II, reaching as it does into every facet of the States' activities, means that Congress could not reasonably have concluded that any significant proportion of the state laws and policies affected by Title II's provisions would be unconstitutional. In sum, Title II lacks that "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" which section 5 demands. *City of Boerne*, 521 U.S. at 520.

ARGUMENT

TITLE II OF THE ADA EXCEEDS CONGRESS' POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT TO ABROGATE THE SOVEREIGN IMMUNITY OF THE STATES.

This case presents the second occasion for the Court to address the validity of Congress' attempt to abrogate the States' sovereign immunity from suits for money damages brought by private persons under the ADA. In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), this Court held the attempt invalid as to damages claims against the States asserted under Title I of the ADA, which forbids discrimination on the basis of disability in employment matters. The Court, however, declined to decide whether Congress had the constitutional authority to subject the States to claims for money damages under Title II of the ADA. *Id.* at 360 n.1. That question is squarely presented here and, for the reasons stated in this brief, should also be answered in the negative.

Petitioner fully shares the view that the ADA represents "a milestone on the path to a more decent, tolerant,

progressive society," *id.* at 375 (Kennedy and O'Connor, J.J., concurring), and does not question its duty to comply with the requirements of Title II in all of its services, programs, and activities.[2] Petitioner likewise recognizes that its officials may be held to account for any breach of that obligation in actions by private individuals for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908), as well as in enforcement actions by the United States. *See Garrett*, 531 U.S. at 374 n.9. What is at stake here, instead, is the preservation of "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . ," *Alden v. Maine*, 527 U.S. 706, 713 (1999), namely, their immunity from suit at the hands of private parties without their consent. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). "The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002).

The validity of any attempt by Congress to abrogate state sovereign immunity turns on the answer to two

[2] More than a decade before the passage of the ADA, petitioner enacted various laws protecting the rights of the disabled. *See, e.g.*, TENN. CODE ANN. § 8-50-103 (2002 Repl.) (prohibiting discrimination against the handicapped in employment matters) (enacted 1976); TENN. CODE ANN. § 8-50-104 (2002 Repl.) (directing state and local government "to give positive emphasis to the recruitment, evaluation, and employment of handicapped persons in the public service . . . .") (enacted 1976); TENN. CODE ANN. §§ 68-120-201–205 (2001 Repl.) (requiring public building accessibility) (enacted 1970).

questions: "first, whether Congress has unequivocally expresse[d] its intent to abrogate the immunity, . . . and second, whether Congress has acted pursuant to a valid exercise of power." *Seminole Tribe*, 517 U.S. at 55 (internal quotations and citations omitted). In the text of the ADA, Congress has clearly stated its intent to subject the States to suit by private persons for violations of Title II. *See* 42 U.S.C. § 12202.

"Whether Congress had the power to compel [the] States to surrender their sovereign immunity for these purposes, however, is another matter." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 635 (1999). Congress sought to rest its adoption of the ADA on "the sweep of . . . [its] authority, including the power to enforce the fourteenth amendment and to regulate commerce . . . ." 42 U.S.C. § 12101(b)(4). The Article I commerce power is not a valid source of authority to override the States' immunity from suit. *Seminole Tribe*, 517 U.S. at 72-73; *Kimel*, 528 U.S. at 78-79. Congress' power under the Fourteenth Amendment is the only source of legislative authority sufficient to support abrogation. *Seminole Tribe*, 517 U.S. at 59-66.

Accordingly, unless Title II constitutes an appropriate exercise of Congress' power under section 5 of the Fourteenth Amendment to enforce the rights guaranteed to the disabled by that Amendment, Congress lacked the constitutional authority to abrogate the States' immunity from suits by private persons under Title II. As was the case with Title I of the ADA, Title II exceeds Congress' section 5 enforcement authority, because the sweeping prohibitions of Title II do not exhibit the constitutionally required "congruence and proportionality between the injury to be

prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

A. Title II was not enacted in response to evidence of a widespread pattern of state action violating the Fourteenth Amendment rights of the disabled.

"'The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch.'" *Nevada Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1977 (2003) (quoting *Kimel*, 528 U.S. at 81)). Thus, the power conferred on Congress by section 5 to enforce the Fourteenth Amendment "by appropriate legislation" is "corrective or preventive, not definitional." *City of Boerne*, 521 U.S. at 525. A valid exercise of that power against the States requires that Congress at a minimum "identify conduct transgressing the Fourteenth Amendment's substantive provisions" on the part of the States. *Florida Prepaid*, 527 U.S. at 639. And when, as in the case of Title II, Congress desires to adopt national enforcement legislation that indiscriminately intrudes upon the sovereignty of all fifty States, it must base its action on evidence of a "widespread and persisting deprivation of constitutional rights" by the States, *City of Boerne*, 521 U.S. at 526, documenting the existence of "a problem of national import." *Florida Prepaid*, 527 U.S. at 641. Measured against these now well-settled standards, the record on which Congress sought to justify Title II is fatally deficient.

1. The legislative record fails to document a pattern of irrational discrimination by the States against the disabled.

To ascertain whether Title II was supported by the requisite evidentiary predicate, "[t]he first step . . . is to identify with some precision the scope of the constitutional right at issue . . . ." *Garrett*, 531 U.S. at 365. Like the other titles of the ADA, Title II is first and foremost equal protection legislation. Its core purpose is "the elimination of *discrimination* against individuals with disabilities," 42 U.S.C. § 12101(b)(1) (emphasis added), in the "services, programs, or activities" of state and local governments. 42 U.S.C. § 12132. Under this Court's equal protection jurisprudence, state action that classifies on the basis of disability "incurs only the minimum 'rational-basis' review applicable to general social and economic legislation." *Garrett*, 531 U.S. at 366 (footnote omitted) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985)). "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993). Moreover, such classifications are presumptively constitutional: "[T]he State need not articulate its reasoning at the moment a particular decision is made," *Garrett*, 531 U.S. at 366, but, instead, "'the burden is on the one attacking . . . [the classification] to negative every conceivable basis which might support it.'" *Heller*, 509 U.S. at 320 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). The Equal Protection Clause of the Fourteenth Amendment thus guarantees to disabled persons the right to be free from wholly arbitrary and irrational discrimination at the hands of the States.

Congress failed to identify any "widespread and persisting" pattern of arbitrary and irrational discrimination by the States against individuals with disabilities in connection with its enactment of Title II. The official congressional findings set forth in the text of the ADA make no mention of constitutional violations. *See* 42 U.S.C. § 12101(a)(1)-(9). Although Congress' findings refer to the existence of both "discrimination against" and "purposeful unequal treatment of" the disabled in many "critical areas" of our society, including "access to public services," those findings do not identify the States as the source of the problem, nor do they even indirectly suggest that any such disparate treatment properly attributable to the States is of the irrational sort that violates the Equal Protection Clause. *Id.* That is to say, insofar as the findings can be said to refer to the States at all, they merely assert that the States are engaged in presumptively constitutional, although perhaps socially undesirable, behavior. Disability is "a characteristic that the government may legitimately take into account in a wide range of decisions." *Cleburne*, 473 U.S. at 446.

Nor do the House and Senate Reports on the ADA contain the slightest hint that Congress was responding to evidence of widespread equal protection violations by the States against persons with disabilities in their services and programs. The Senate Report's succinct statement of Title II's purposes does not express any concerns of constitutional dimension:

> Title II of the legislation has two purposes. The first purpose is to make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 of the Rehabilitation Act of 1973, to all programs, activities, and services provided or made available by state and local governments ... regardless of whether or not such entities receive Federal financial assistance. Currently, section 504 prohibits discrimination only by recipients of Federal financial assistance.
>
> The second purpose is to clarify the requirements of section 504 for public transportation entities that receive Federal aid, and to extend coverage to all public entities that provide public transportation, whether or not such entities receive Federal aid.

S. REP. NO. 101-116, 101st Cong., 1st Sess. 44 (1989). Conspicuously absent from this explanation of Title II's purposes is any allegation that the States had been ignoring the requirements of the Rehabilitation Act in those programs to which that Act had applied for nearly two decades prior to the passage of Title II, or that the States were engaged in wholesale unconstitutional discrimination in those programs and services not yet covered. The House Report similarly cited the need to expand the reach of the antidiscrimination provisions of the Rehabilitation Act as a central objective of the ADA but did not allege any pattern or practice of violations of that Act by the States, let alone widespread, irrational discrimination against disabled persons. The House Report emphasized instead that additional legislation was needed because "section 504 [of the Rehabilitation Act] does not apply to *private sector entities* that do not receive Federal funds." H.R. REP. NO. 101-485(IV), 101st Cong., 2d Sess. 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 512, 513 (emphasis added).

Indeed, far from indicating concerns about state-sponsored misconduct, the legislative record reflects

congressional recognition of the States' leadership in safeguarding the rights of the disabled. As this Court observed in *Garrett*: "It is worth noting that by the time Congress enacted the ADA in 1990, every State in the Union had enacted such measures. At least one Member of Congress remarked that 'this is probably one of the few times where the States are so far out in front of the Federal Government, it's not funny.'" 531 U.S. at 368 n.5. The Senate Report candidly acknowledged that "[a]ll states currently mandate accessibility in newly constructed state-owned public buildings . . . ," S. REP. NO. 101-116 at 92, and recognized that "[v]irtually all States prohibit unfair discrimination among persons of the same class and equal expectation of life." *Id.* at 182. Senator Hatch applauded the "growing array of programs and antidiscrimination provisions at the local, *state* and federal levels designed to enhance [the opportunities of disabled persons] to lead lives of independence . . . ," *id.* at 96 (emphasis added), while others expressed the view that existing state antidiscrimination laws provided a model for federal action. *See, e.g.,* 136 CONG. REC. H2614 (daily ed. May 22, 1990) (Statement of Rep. Berman) ("States like California, Pennsylvania, New York, North Carolina, Massachusetts, Connecticut, Iowa, Illinois and others have offered models on which many aspects of the ADA are based.").

Nor did the information presented to Congress by the Task Force on the Rights and Empowerment of Americans with Disabilities ("Task Force Report"), summarized in Appendix C to Justice Breyer's dissenting opinion in *Garrett*, 531 U.S. at 391-424, document a pattern of irrational exclusion of the disabled from participation in state services, programs and activities. In the first place, these "unexamined, anecdotal accounts of adverse disparate treatment"

of the disabled, *id.* at 370 (internal quotations omitted), "are so lacking in detail as to make it impossible to determine whether a constitutional violation actually occurred." *Wessel v. Glendening*, 306 F.3d 203, 213 (4th Cir. 2002). Furthermore, fewer than one-third of the examples listed in Appendix C clearly refer to any conduct by a state actor. Although by far the largest category of examples in the compilation concerns a lack of physical access to government buildings and transportation facilities due to architectural barriers and design deficiencies, as well as the failure to comply with regulations regarding handicap parking spaces, most of these examples do not specify state ownership or control of the facilities in question. And, significantly, merely reciting the failure of a state or local government agency to retrofit its facilities to accommodate the disabled, or to provide more convenient parking for the disabled, does not establish an equal protection violation.

"The failure of a State to revise policies now seen as incorrect under a new understanding of proper policy does not always constitute the purposeful and intentional action required to make out a violation of the Equal Protection Clause." *Garrett*, 531 U.S. at 375 (Kennedy and O'Connor, J.J., concurring). This Court has recognized since *Cleburne* that the "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational." *Id.* at 367. While decisions by state officials to allocate limited tax dollars to priorities other than improved handicap access to public buildings and transport may justifiably be criticized as "hardheaded" and even "hardhearted," *id.*, such choices are not irrational and are therefore presumptively constitutional.

"If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." *Id.* at 368 (footnote omitted).

Finally, the legislative record contains no discussion of state or federal case law demonstrating the existence of widespread equal protection violations by the States arising from discriminatory exclusion of disabled persons from access to government programs and services. The failure of Congress to cite to any such "confirming judicial documentation" is hardly surprising, since, as Justices Kennedy and O'Connor have already noted in their concurring opinion in *Garrett*, "it does not exist." *Id.* at 376.

2. The legislative record likewise fails to document a pattern of state action violating the due process rights of the disabled.

In this case, the court below asserted that the aim of Title II was not merely to safeguard the rights of the disabled to equal protection of the laws but to enforce the Due Process Clause of the Fourteenth Amendment as well. According to the court of appeals, the specific due process right implicated by respondents' Complaint was "the right of access to the courts." (Pet. App. 3) But, in the court's view, the existence of "physical barriers in government buildings" generally has "had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause," thereby rendering Title II appropriate section 5 enforcement legislation. (Pet. App. 3-4)

The citizens of the States, including disabled citizens, enjoy a panoply of fundamental constitutional rights

protected by the Fourteenth Amendment's due process guarantee, among them, the rights enumerated in the Bill of Rights that have been incorporated through the Due Process Clause, *e.g.*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992) ("[T]he Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States."); the right of access to the courts, *e.g.*, *Boddie v. Connecticut*, 401 U.S. 371, 377-78 (1971) (Though not guaranteed a trial on the merits, "persons forced to settle claims of right and duty through judicial process must be given meaningful opportunity to be heard."); the right to vote, *e.g.*, *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental . . ."); the right to travel, *e.g.*, *Jones v. Helms*, 452 U.S. 412, 418-19 (1981) (The right to travel is a "privilege of national citizenship, and . . . an aspect of liberty that is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments."); and various parenting, procreative, and privacy rights, *e.g.*, *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) ("[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education."). State action abridging these rights is subject to strict scrutiny and may survive constitutional challenge only if necessary to achieve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

The legislative record fails to support the Sixth Circuit's claim that Title II was enacted to remedy widespread and persisting due process violations by the States. There is no reference to any of the aforementioned fundamental rights in the findings section of the ADA, save a

cursory reference to the existence of "discrimination against individuals with disabilities . . . in . . . voting." 42 U.S.C. § 12101(a)(3). But that solitary reference neither identifies state actors as the perpetrators of such discrimination nor even remotely suggests that the difficulties encountered by some disabled individuals in gaining physical access to deficiently designed polling places have resulted in widespread, unconstitutional deprivations of the right to vote. *Id.* Similarly, the findings' generic statement that the disabled have encountered discrimination in access to "public services," *id.*, simply cannot be read to allege a systematic pattern of fundamental rights violations by the States.

The Senate and House Reports are no more illuminating. Under the major heading "Nature and Extent of Discrimination on the Basis of Disability" and subheading "Public services," the Senate Report describes only one problem pertinent here – that the "Committee heard about people with disabilities who were forced to vote by absentee ballot before key debates by the candidates were held." S. REP. NO. 101-116 at 12. No unconstitutional abridgment of the right to vote is easily discerned from these incidents. The House Report contains no discussion whatsoever of any state action abridging the fundamental rights of the disabled.

In sum, there are no findings either in the ADA itself or in the reports accompanying the legislation to the floor of each house of Congress that Title II was needed to remedy rampant violations of fundamental rights by the States. And the handful of incidents described in the Task Force Report that might conceivably rise to the level of such a violation suffer from the same infirmities as those anecdotes discussed above in connection with the Equal

Protection Clause. They are simply too vague in content and too few in number to establish a pattern of state misconduct warranting invocation of Congress' section 5 powers.

B. Title II is not congruent with or proportional to an appropriate remedial objective authorized by section 5 of the Fourteenth Amendment.

Because the traditional separation of powers assigns "to this Court, not Congress, [the authority] to define the substance of constitutional guarantees," *Hibbs*, 123 S. Ct. at 1977, Congress' section 5 power to remedy and deter violations of the Fourteenth Amendment on the part of the States is "not the power to determine what constitutes a constitutional violation," *City of Boerne*, 521 U.S. at 519, or "to substantively redefine the States' legal obligations" under section 1. *Kimel*, 528 U.S. at 88. "Congress does not enforce a constitutional right by changing what the right is." *City of Boerne*, 521 U.S. at 519. A valid exercise of the section 5 enforcement power is, therefore, one "adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against." *The Civil Rights Cases*, 109 U.S. 3, 13 (1883). To insure proper respect for "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law," *City of Boerne*, 521 U.S. at 519, the Constitution demands of section 5 legislation that there "be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520.

Garrett held that Title I of the ADA unconstitutionally crossed that line in at least three critical respects. First,

after examining whether Congress had identified evidence of widespread, irrational mistreatment of the disabled by the States in the employment sphere, the Court concluded that the legislative record of the ADA fell "far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based." *Garrett*, 531 U.S. at 370. The Court also determined that Title I's core "reasonable accommodation" requirement "far exceed[ed] what is constitutionally required" of the States, (1) because it imposed on state employers a duty to make the workplace accessible to disabled employees, even when it would be rational for employers to save money by hiring only workers able to use existing facilities, and (2) because it placed the burden on state employers to justify a failure to accommodate on grounds of undue hardship, "instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer's decision." *Id.* at 372. Finally, the Court focused on provisions of Title I forbidding employment practices "that disparately impact the disabled, without regard to whether such conduct has a rational basis" and found them disproportionate to any legitimate remedial objective. *Id.* at 372-74.

Petitioner has already exposed the serious inadequacies in the legislative record on which Congress sought to ground Title II. That record provided no more justification for an exercise of Congress' section 5 enforcement power to remedy alleged discrimination against the disabled by the States in their "services, programs, or activities" than it did to support application of Title I's employment discrimination ban to the States. In addition, the rights and remedies created by Title II share all of the incongruent and disproportionate features of Title I deemed unconstitutional by this Court in *Garrett*.

1. Title II's indiscriminate scope and extra-constitutional remedial scheme are not tailored to cure violations of the Fourteenth Amendment rights of the disabled.

Title II's lack of congruence with any constitutional injury that has been inflicted by the States on disabled persons is apparent on the face of the statute. Title II reaches all "services, programs, or activities" of the States, 42 U.S.C. § 12132, a formulation that "encompasses virtually everything that a public entity does." *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998). Its provisions are not tailored to eradicate discrimination in those programs and services that might impact the exercise of fundamental constitutional rights. Instead, "Title II targets *every* state law, policy or program," *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1009 (8th Cir. 1999) (en banc), *cert. dismissed*, 529 U.S. 1001 (2000), addressing an unlimited array of subjects ranging from parking space availability at state museums[3] and concert seating priorities at state performing arts centers[4] to recreational offerings at

[3] *See, e.g.*, U.S. Dep't of Justice, The Americans with Disabilities Act: Title II Technical Assistance Manual (1993) ("TAM") § II-5.4000: "A public entity should provide an adequate number of accessible parking spaces in existing parking lots or garages over which it has jurisdiction."

[4] *See, e.g.*, TAM § II-5.2000, illus. 4 (Supp. 1994): "A municipal performing arts center provides seating at two prices – inexpensive balcony seats and more expensive orchestra seats. All of the accessible seating is located on the higher priced orchestra level. In lieu of providing accessible seating on the balcony level, the city must make a reasonable number of accessible orchestra-level seats available at the lower price of balcony seats."

state parks[5] and the configuration of bathroom stalls at highway rest areas.[6] Thus, Title II suffers from the same defect that was fatal to the Religious Freedom Restoration Act, struck down by this Court in *City of Boerne*: Title II "cannot be considered remedial, preventive legislation, if those terms are to have any meaning," because its "[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." 521 U.S. at 532.

Unlike the Voting Rights Act of 1965, approved by this Court as an appropriate exercise of Congress' power to enforce the Fifteenth Amendment in *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966), Title II is the very antithesis of "a detailed but limited remedial scheme" crafted to address a clearly "targeted violation" of the constitutional rights of disabled persons. *Garrett*, 531 U.S. at 373-74; *see also Hibbs*, 123 S. Ct. at 1983 ("[T]he FMLA is narrowly targeted . . . and affects only one aspect of the employment relationship."). Instead, Title II more closely resembles the Patent Remedy Act, declared unconstitutional in *Florida Prepaid*: When fashioning Title II's

[5] *See, e.g.*, TAM § II-3.5100, illus. 1: "The director of a county recreation program prohibits persons who use wheelchairs from participating in county-sponsored scuba diving classes because he believes that persons who use wheelchairs probably cannot swim well enough to participate. An unnecessary blanket exclusion of this nature would violate the ADA."

[6] *See, e.g.*, TAM § II-5.1000, illus. 3: "A State provides ten rest areas approximately 50 miles apart along an interstate highway. Program accessibility requires that an accessible toilet room for each sex with at least one accessible stall, or a unisex bathroom, be provided at each rest area."

comprehensive antidiscrimination mandate, "Congress did nothing to limit . . . [its] coverage . . . to cases involving arguable constitutional violations" or to those "States with . . . a high incidence of" such violations. 527 U.S. at 646-47. In Title II, as in the Patent Remedy Act, "Congress made all States immediately amenable to suit in federal court" for "[a]n unlimited range of state conduct" and "for an indefinite duration." *Id.* Title II's "indiscriminate scope" alone deprives it of that congruence and proportionality essential to valid section 5 legislation. *Id.* at 647.

Moreover, in the vast majority of circumstances to which Title II applies, the rights and remedies made available to disabled persons by the statute impose requirements on the States that go well beyond anything demanded of them by the Constitution. While as a general rule the "States are not required by the Fourteenth Amendment to make special accommodations for the disabled," *Garrett*, 531 U.S. at 367, Title II commands that the States must make "reasonable modifications to rules, policies, or practices," remove "architectural, communication, or transportation barriers," and furnish "auxiliary aids and services," 42 U.S.C. § 12131(2), if necessary to allow a "qualified individual with a disability" access to state-sponsored "services, programs, or activities." 42 U.S.C. § 12132. In other words, "[i]n contrast to the Equal Protection Clause['s] prohibition on invidious discrimination against the disabled and irrational distinctions between the disabled and the nondisabled, Title II requires public entities to recognize the unique position of the disabled and to make favorable accommodations on their behalf." *Thompson v. Colorado*, 278 F.3d 1020, 1031 (10th Cir. 2001), *cert. denied*, 535 U.S. 1077 (2002). Similarly, the regulations implementing Title II make clear

that the failure of a State to make such "favorable accommodations" is presumptively illegal under Title II, unless it "can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity" involved. 29 C.F.R. § 35.130(b)(7). By contrast, the Fourteenth Amendment presumes that a decision not to undertake such affirmative efforts to assist the disabled is entirely permissible, and it casts the burden upon the party claiming otherwise to demonstrate irrational, disparate treatment on the part of the State. *Garrett*, 531 U.S. at 372.

Indeed, Title II's reach is not in the least confined to state decisions made with conscious intent to treat disabled persons differently than other citizens. "Title II focuses on disparate effects divorced from any inquiry into intent." *Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn*, 280 F.3d 98, 110 (2d Cir. 2001). *See, e.g.*, 29 C.F.R. § 35.130(b)(3)(i) (forbidding the use of criteria or methods of administration in state programs "[t]hat have the effect of subjecting [disabled persons] to discrimination"); 29 C.F.R. § 35.130(b)(4)(i) (forbidding the selection of sites for public facilities "[t]hat have the effect of . . . subjecting [the disabled] to discrimination"); 29 C.F.R. § 35.130(b)(8) (forbidding the use of program eligibility criteria that "tend to screen out an individual with a disability").[7] But

[7] There can be little doubt that these disparate impact regulations accurately interpret Title II's provisions. Congress directed in Title IV of the ADA that no provision of the statute "shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a). The Rehabilitation Act, in turn, authorizes discrimination claims against federal

(Continued on following page)

state action for which there exists some rational basis does not violate the Fourteenth Amendment simply because it may have an adverse, disparate effect on access of disabled persons to state programs and services. For purposes of establishing a constitutional violation, "evidence [of disparate impact] alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny." *Garrett*, 531 U.S. at 373.

Title II's lack of proportionality is further revealed when its remedial provisions are compared with those contained in Title III of the ADA, which imposes access and accommodation duties on the private sector comparable to those placed on public entities by Title II. Whereas Congress chose in Title II to subject the States to suits for money damages, *see generally Barnes v. Gorman*, 536 U.S. 181 (2002), disabled persons are *not* entitled to recover such relief in a suit to enforce a private sector entity's obligations under Title III[8] but are instead limited to injunctive relief and recovery of attorneys' fees. 42 U.S.C. § 12188(a)(1); 42 U.S.C. § 2000a-3(a). There is certainly nothing in the ADA's legislative history to support the proposition that individuals with disabilities had experienced less serious or pervasive discrimination in the private sector than at the hands of the States or that stronger measures were needed to insure compliance with the ADA's access and modification mandates by States

grantees arising from policies and practices that have the effect of denying to handicapped persons "meaningful access to the benefit that the grantee offers." *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

[8] Congress limited the availability of money damages under Title III to suits brought by the U.S. Attorney General. 42 U.S.C. § 12188(b).

than by private entities. To the contrary, as previously discussed, the House Report cited the urgency of addressing discrimination *in the private sector* as the primary reason for expanding the reach of the Rehabilitation Act's access requirements beyond recipients of federal funds through the vehicle of the ADA.

All of these features of Title II's remedial scheme demonstrate that the legislation was calculated not to remedy or deter violations of the Fourteenth Amendment rights of disabled persons but rather to accomplish precisely the objective that section 5 forbids – "a substantive redefinition" of the States' obligations under section 1 of the Amendment. *Kimel,* 528 U.S. at 81. Indeed, Congress made no pretense otherwise. In the ADA's statement of findings and purpose, Congress declared that "individuals with disabilities are a discrete and insular minority ... relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and ... not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a)(7). These words are, of course, borrowed directly from this Court's case law defining the content of the Fourteenth Amendment's substantive guarantees. *See United States v. Carolene Prod. Co.,* 304 U.S. 144, 152-53 n.4 (1938) ("discrete and insular minorities"); *Mathews v. Lucas,* 427 U.S. 495, 505 (1976) (illegitimacy deserves quasi-suspect classification status because that characteristic has "no relation to the individual's ability to participate in and contribute to society."). And these words unmistakably reveal Congress' intent that state policies affecting the disabled should be subjected to the more exacting levels of scrutiny reserved by the Fourteenth Amendment for "suspect" or

"quasi-suspect" classifications, despite this Court's express holding to the contrary only five years earlier in *Cleburne.* 473 U.S. at 442-48.

2. Title II is not sustainable as prophylactic legislation needed to deter constitutional violations by the States.

Title II prohibits the States from enacting a wide range of entirely constitutional measures affecting the interests of disabled persons and, in addition, requires the States to undertake on their behalf countless affirmative efforts that the Constitution does not command. While Congress' section 5 enforcement power includes the authority to deter violations of the Fourteenth Amendment "by prohibiting a somewhat broader swath of conduct ... [than is] forbidden by the Amendment's text," *Kimel*, 528 U.S. at 81, Title II does not satisfy any of the requirements of constitutionally valid prophylactic legislation.

Most significantly, the paucity of evidence before Congress indicating that the States were engaged in a pattern of unconstitutional discrimination against individuals with disabilities "confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field." *Id.* at 91. Although section 5 prophylactic legislation may be justified by "the extent and specificity of the ... record of unconstitutional state conduct" presented to Congress, *Hibbs*, 123 S. Ct. at 1981 n.11, it bears repeating that the legislative record of the ADA reveals neither widespread irrational treatment of disabled persons nor persistent denials of their fundamental rights by the States.

Second, during its deliberations leading to the enactment of Title II, Congress did not face a situation "where

previous legislative attempts had failed" to turn the States away from unconstitutional practices with respect to the disabled, so as to "justify added prophylactic measures in response." *Id.* at 1982. *See also Kimel,* 528 U.S. at 88 ("Difficult and intractable problems often require powerful remedies . . . "). Dating back to the adoption of the Rehabilitation Act of 1973, 29 U.S.C. § 701, all state agencies receiving federal financial assistance had been required to follow most of the same access requirements imposed on the States by Title II.[9] Yet Congress made no finding of widespread state violations of the Rehabilitation Act at the time of its passage of the ADA. Indeed, the legislative record suggests that it was the very efficacy of this prior enactment that spurred Congress to expand its requirements through the ADA to all state "services, programs, or activities" as well as to the private sector.

[9] Although not at issue in this appeal, petitioner notes that the circuits are split over whether the States have immunity from private suits for money damages under the Rehabilitation Act. *Compare Reickenbacker v. Foster,* 274 F.3d 974, 983 (5th Cir. 2001) (Congress exceeded its authority in abrogating the States' immunity under the Rehabilitation Act), *and Garcia*, 280 F.3d at 114-15 (the acceptance of federal funds under the Rehabilitation Act by the State of New York did not constitute a knowing waiver of sovereign immunity), *with Shepard v. Irving,* No. 02-1712, 2003 WL 21977963 at *8 (4th Cir. Aug. 20, 2003) (a state's acceptance of federal funds under the Rehabilitation Act constitutes a voluntary waiver of sovereign immunity), *and Koslow v. Commonwealth of Pa.,* 302 F.3d 161, 169-71 (3d Cir. 2002) (same), *cert. denied,* 123 S. Ct. 1353 (2003), *and Robinson v. Kansas*, 295 F.3d 1183, 1189-90 (10th Cir. 2002) (same), *cert. denied,* 123 S. Ct. 2574 (2003), *and Nihiser v. Ohio Envtl. Prot. Agency,* 269 F.3d 626, 628 (6th Cir. 2001) (same), *cert. denied*, 536 U.S. 922 (2002), *and Douglas v. California Dep't of Youth Auth.*, 271 F.3d 812, 820-21 (9th Cir. 2001) (same), *cert. denied*, 536 U.S. 924 (2002), and *Jim C. v. United States*, 235 F.3d 1079, 1081-82 (8th Cir. 2000) (en banc) (same), *cert. denied sub nom. Arkansas Dep't of Educ. v. Jim C.*, 533 U.S. 949 (2001).

Finally, the sheer breadth of Title II's coverage, which reaches into every facet of the States' business, compels the conclusion that there is no "reason to believe that many of the laws affected by . . . [Title II] have a significant likelihood of being unconstitutional." *City of Boerne*, 521 U.S. at 532. To the contrary, the vast majority of state action, as well as inaction, made illegal by Title II would not violate the Fourteenth Amendment rights of disabled persons. In sum, Title II "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.*

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General & Reporter
for the State of Tennessee

MICHAEL E. MOORE*
Solicitor General
*Counsel of Record

S. ELIZABETH MARTIN
MARY MARTELLE COLLIER
Senior Counsel

OFFICE OF THE ATTORNEY GENERAL
& REPORTER FOR THE STATE
OF TENNESSEE
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-3226

Attorneys for Petitioner

APPENDIX A

SELECTED PROVISIONS FROM THE AMERICANS WITH DISABILITIES ACT OF 1990

42 U.S.C. § 12101. Findings and purpose

(a) Findings

The Congress finds that –

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure

to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter –

(1) to provid a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

(Pub.L. 101-336, § 2, July 26, 1990, 104 Stat. 328)

---

42 U.S.C. § 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes –

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered

materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(Pub.L. 101-336, § 3, July 26, 1990, 104 Stat. 329.)

---

42 U.S.C. § 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means –

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of Title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

(Pub.L. 101-336, Title II, § 201, July 26, 1990, 104 Stat. 337.)

---

42 U.S.C. § 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

(Pub.L. 101-336, Title II, § 202, July 26, 1990; 104 Stat. 337.)

---

42 U.S.C. § 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

(Pub.L. 101-336, Title II, § 203, July 26, 1990, 104 Stat. 337.)

---

42 U.S.C. § 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of Title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

(Pub.L. 101-336, Title II, § 204, July 26, 1990, 104 Stat. 337.)

---

42 U.S.C. § 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in[1] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

(Pub.L. 101-336, Title V, § 502, July 26, 1990, 104 Stat. 370.)

---

[1] So in original. Probably should be "in a".

APPENDIX B

SELECTED PROVISIONS FROM THE REHABILITATION ACT OF 1973

29 U.S.C. § 794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Pub.L. 93-112, Title V, § 505, as added Pub.L. 95-602, Title I, § 120(a), Nov. 6, 1978, 92 Stat. 2982.)

APPENDIX C

SELECTED REGULATIONS FROM TITLE 28 CHAPTER 1 PART 35

28 C.F.R. § 35.160 General.

(a) A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

(2) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

---

28 C.F.R. § 35.101 Purpose.

The purpose of this part is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12131), which prohibits discrimination on the basis of disability by public entities.

---

28 C.F.R. § 35.130 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in

or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability –

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections –

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service,

program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an

individual with whom the individual or entity is known to have a relationship or association.

---

28 C.F.R. § 35.149 Discrimination prohibited.

Except as otherwise provided in § 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

---

28 C.F.R. § 35.150 Existing facilities.

(a) General. A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not –

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue

financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

(b) Methods –

(1) General. A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making

alterations to existing buildings, shall meet the accessibility requirements of § 35.151. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(2) Historic preservation programs. In meeting the requirements of § 35.150(a) in historic preservation programs, a public entity shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to an historic property is not required because of paragraph (a)(2) or (a)(3) of this section, alternative methods of achieving program accessibility include –

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) Time period for compliance. Where structural changes in facilities are undertaken to comply with the obligations established under this section, such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible.

(d) Transition plan.

(1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, a

public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.

(2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

(3) The plan shall, at a minimum –

(i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;

(ii) Describe in detail the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

(4) If a public entity has already complied with the transition plan requirement of a Federal agency regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this paragraph (d) shall apply only to those policies and practices that were not included in the previous transition plan.

---

28 C.F.R. § 35.151 New construction and alterations.

(a) Design and construction. Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(b) Alteration. Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

(c) Accessibility standards. Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR part 101-19.6) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) (Appendix A to 28 CFR part 36) shall be deemed to comply with the requirements of this section with respect to those facilities, except that the elevator exemption contained at section 4.1.3(5) and section

4.1.6(1)(k) of ADAAG shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(d) Alterations: Historic properties.

(1) Alterations to historic properties shall comply, to the maximum extent feasible, with section 4.1.7 of UFAS or section 4.1.7 of ADAAG.

(2) If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of § 35.150.

(e) Curb ramps.

(1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.

(2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.

---

28 C.F.R. § 35.164 Duties.

This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the

public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

NOV 12 2003

No. 02-1667

IN THE

Supreme Court of the United States

State of Tennessee,

Petitioner,

v.

George Lane, Beverly Jones, and
United States of America.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE PRIVATE RESPONDENTS

Samuel R. Bagenstos
1545 Massachusetts Ave.
Cambridge, MA 02138

Thomas C. Goldstein
Goldstein & Howe, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

William J. Brown
(Counsel of Record)
William J. Brown & Assocs.
23 North Ocoee St.
Cleveland, TN 37364
(423)476-4515

November 12, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES iii
STATEMENT 1
I. The Statutory Scheme 1
II. The Facts 3
III. Proceedings Below 6
SUMMARY OF ARGUMENT 7
ARGUMENT 9
I. Title II's Requirement That State Courts Be Accessible To People With Disabilities Reasonably Protects Against Violations Of Disabled Citizens' Rights Of Access To The Courts 12
A. Inaccessible Courts Threaten An Array Of Constitutional Rights 13
B. There Is A Significant Pattern Of Inaccessible Courts Throughout The States 20
C. Title II's Program Accessibility Requirement Is A Proportional Response To The Constitutional Violations Threatened By Inaccessible Courts 28
II. Title II As A Whole Reasonably Responds To The History And Threat Of Unconstitutional Exclusion Of Citizens With Disabilities From A Wide Range Of State Activities 34
A. Because Congress Had Power To Mandate Accessible State Court Systems, The Court Need Not Consider Whether Title II May Be Upheld More Broadly 134
B. Title II Responds To A Widespread Record Of Actual And Threatened Constitutional Violations 20

C. Title II Is A Proportional Response To This Widespread Pattern Of Unconstitutional Exclusion 28
CONCLUSION 50

TABLE OF AUTHORITIES

Cases

Barnes v. *Gorman*, 536 U.S. 181 (2002) 33
BE&K Constr. Co. v. *NLRB*, 536 U.S. 516 (2002) 14
Beckford v. *Irvin*, 49 F. Supp. 2d 170 (W.D.N.Y. 1999) 48
Bivens v. *Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388 (1971) 33
Board of County Comm'rs v. *Umbehr*, 518 U.S. 668 (1996) 19
Board of Trustees v. *Garrett*, 531 U.S. 356 (2001) ..... passim
Boddie v. *Connecticut*, 401 U.S. 371 (1971) 16
Buckley v. *Valeo*, 424 U.S. 1 (1976) (per curiam) 21
Bullock v. *Carter*, 405 U.S. 134 (1972) 44
Bush v. *Gore*, 531 U.S. 98 (2000) (per curiam) 15, 46
Callahan v. *City of Philadelphia*, 207 F.3d 668 (3d Cir. 2000) 20
Casey v. *Lewis*, 834 F. Supp. 1569 (D. Ariz. 1993) 48
City of Boerne v. *Flores*, 521 U.S. 507 (1997) ..... passim
City of Cleburne v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985) 43, 49
Clarkson v. *Coughlin*, 898 F. Supp. 1019 (S.D.N.Y. 1995) 48
Davis v. *Tuolumne County*, No. CV-F-97-5516-SMS (E.D. Cal.) 24
Doe v. *Regier*, No. 03-2794 (Fla. Dist. Ct. App.) 11
Doe v. *Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001) 43
Esteves v. *Brock*, 106 F.3d 674 (5th Cir.), cert. denied, 522 U.S. 828 (1997) 20
Faretta v. *California*, 422 U.S. 806 (1975) 16
Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976) 32
Florida Prepaid Postsecondary Educ. Expense Bd. v. *College Sav. Bank*, 527 U.S. 627 (1999) 36
Franceschi v. *Schwartz*, 57 F.3d 828 (9th Cir. 1995) 20

Franklin v. *Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992) 33
Globe Newspaper Co. v. *Superior Court*, 457 U.S. 596 (1982) 18
Griffin v. *Breckenridge*, 403 U.S. 88 (1971) 9, 37, 38
Harper v. *Bd. of Elections*, 383 U.S. 663 (1966) 43, 44
Illinois v. *Allen*, 397 U.S. 337 (1970) 16
Jernigan v. *Superior Court*, No. C03-2530WHA(PR), 2003 WL 21640489 (N.D. Cal. July 7, 2003) 20
Jonas v. *General Services Comm'n*, No. A-95-CV-468-JN (W.D. Tex.) 24
Kelly v. *Municipal Courts*, 97 F.3d 902 (7th Cir. 1996) 20
Kimel v. *Florida Bd. of Regents*, 528 U.S. 62 (2000) .... passim
Kroll v. *St. Charles County*, 766 F. Supp. 744 (E.D. Mo. 1991) 24
LaFaut v. *Smith*, 834 F.2d 389 (4th Cir. 1987) 49
Layton v. *Elder*, 143 F.3d 469 (8th Cir. 1999) 24
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 33
M.L.B. v. *S.L.J.*, 519 U.S. 102 (1996) 15, 16, 18, 35
Manhattan State Citizens' Group, Inc. v. *Bass*, 524 F. Supp. 1270 (S.D.N.Y. 1981) 43
Maryland v. *Craig*, 497 U.S. 836 (1990) 16
Matthews v. *Jefferson*, 29 F. Supp. 2d 525 (W.D. Ark. 1998) 24
McCarthy v. *Hale*, No. 03-50608 (5th Cir.) 11
Meyers v. *Texas*, No. 02-50452 (5th Cir.) 11
Miles v. *County of Los Angeles*, No. 02-CV-3932 DT (JTLx) (C.D. Cal.) 24
Nevada Dep't of Human Resources v. *Hibbs*, 123 S. Ct. 1972 (2003) ..... passim
No Barriers, Inc. v. *Cornelius*, No. 3:97CV-2330-R (N.D. Tex.) 24
Olmstead v. *L.C.*, 527 U.S. 581 (1999) 18, 47, 50
Owen v. *City of Independence*, 445 U.S. 622 (1980) 33

Plessy v. *Ferguson*, 163 U.S. 537 (1896) 10
Plyler v. *Doe*, 457 U.S. 202 (1982) 45
Popovich v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002) 7
Powers v. *Ohio*, 499 U.S. 400 (1991) 18
Press-Enterprise Co. v. *Superior Court*, 478 U.S. 1 (1986) 18
Pusey v. *City of Youngstown*, 11 F.3d 652 (6th Cir. 1993), cert. denied, 512 U.S. 1237 (1994) 20
Reynolds v. *Sims*, 377 U.S. 533 (1964) 15, 43
Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980) 19
Romer v. *Evans*, 517 U.S. 620 (1996) ..... passim
Saenz v. *Roe*, 526 U.S. 489 (1999) 9, 10, 42
Salinas v. *United States*, 522 U.S. 52 (1997) 9, 34, 39
Salmond v. *County of Teton*, No. CV-97-130-GF-LBE (D. Mont. Dec. 21, 2000) 24
San Antonio Indep. Sch. Dist. v. *Rodriguez*, 411 U.S. 1 (1973) 45
Shotz v. *Cates*, 256 F.3d 1077 (11th Cir. 2001) 24
Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 46
Snyder v. *Massachusetts*, 291 U.S. 97 (1934) 16
South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 27
Stanley v. *Illinois*, 405 U.S. 645 (1972) 46, 49
State v. *Rendon*, 832 So. 2d 141 (Fla. Dist. Ct. App. 2002), rvw. denied, 851 So. 2d 729 (Fla. 2003) 11
Taylor v. *Louisiana*, 419 U.S. 522 (1975) 17
Thompson v. *Colorado*, 278 F.3d 1020 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002) 11
Troxel v. *Granville*, 530 U.S. 57 (2000) 46
United States v. *Nat'l Treasury Employees Union*, 513 U.S. 454 (1995) 38, 39
United States v. *Raines*, 362 U.S. 17 (1960) 9, 37, 38

United States v. *Salerno*, 481 U.S. 739 (1987) 36
Waller v. *Georgia*, 467 U.S. 39 (1984) 5, 18, 29
Waters v. *Churchill*, 511 U.S. 661 (1994) 20
Weeks v. *Chaboudy*, 984 F.2d 185 (6th Cir. 1993) 48
Wessel v. *Glendening*, 306 F.3d 203 (4th Cir. 2002) 39
Wheat v. *United States*, 486 U.S. 153 (1988) 17
Youngberg v. *Romeo*, 457 U.S. 307 (1982) 47, 49
Zablocki v. *Redhail*, 434 U.S. 374 (1978) 46

Statutes

18 U.S.C. § 666(a)(1)(B) 35, 39
20 U.S.C. § 1400(c)(2)(C) 46
42 U.S.C. § 12101(a)(2) 47
42 U.S.C. § 12101(a)(3) 41, 42, 43, 47
42 U.S.C. § 12101(a)(7) 42
42 U.S.C. § 12111(2) 39
42 U.S.C. § 12111(5) 39
42 U.S.C. § 12111(7) 39
42 U.S.C. § 12131 49
42 U.S.C. § 12132 ..... 1, 39, 49
42 U.S.C. § 12134(b) 1
42 U.S.C. § 12181(7) 41
42 U.S.C. § 12182(b)(2)(A)(iv) 1
42 U.S.C. § 12183(a)(1) 1
42 U.S.C. § 12202 39
42 U.S.C. § 1971(c) 37
42 U.S.C. § 1985(3) 37
42 U.S.C. § 2000e(a) 39
Civil Rights Act of 1957, 42 U.S.C. § 1971 et seq. 37
Rehabilitation Act of 1973, 42 U.S.C. § 12134 1

Other Authorities

56 Fed. Reg. 35694 (1991) 1

Americans with Disabilities Act of 1989: Hearings Before Senate Comm. on Labor & Subcom. on the Handicapped (1989) 22, 26, 44, 45
Attorney General's Comm'n on Disability, Final Report (1989) 14
Br. for the United States, *Medical Board of California* v. *Hason*, No. 02-479 42
Burton D. Dunlop & Marisa E. Collett, Jury Service Accessibility for Older Persons and Persons with Disabilities in Florida, *available at http://www.fiu.edu/~coa/research/jury.htm* 23
Civil and Legal Rights Subcomm., Governor's Comm. on Disability Issues & Employment, Interim Court and Courthouse Access Project (2000) 23
Comm'n on the Future of the Tenn. Judicial Sys., Final Report (1996), *available at http://www.tsc.state.tn.us/geninfo/publications/future s.pdf* (last visited Nov. 11, 2003) 4
D. Michailakis, Government Action on Disability Policy: A Global Survey (1997) 11
Disability Discrimination Act of 1992 (Austl.) 11
House Comm. on Educ. & Labor, Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act (1990) ..... passim
http://www.usdoj.gov/crt/ada/enforce.htm 25
Judicial Council of California, Public Hearings Report: Access for Persons with Disabilities (1996) 23
N.Y. State Comm'n on Qual. of Care for the Mentally Disabled & N.Y. State Bar Ass'n Comm. on Mental & Physical Disability, Survey of Access to N.Y. State Courts for Individuals with Disabilities (1994) 23
Phyllis S. Launius, Removing Public Access Barriers to the Courts in the New Millennium: A Sampling and Analysis of Missouri's Trial Courts (2000) 23

Ruth Colker & Adam Milani, *The Post*-Garrett *World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075, 1083 (2002) 26
Task Force Submission, Cal. 22
Task Force Submission, Col. 22
Task Force Submission, Ga. 22
Task Force Submission, Haw. 22
Task Force Submission, Mass. 22
Task Force Submission, Mo. 22
Task Force Submission, Pa. 22
Task Force Submission, S.D. 22
Task Force Submission, W. Va. 22
Task Force Submission, Wash. 22
Task Force Submission, Wis. 22
Task Force Submission, Wyo. 22
Task Force Submissions, Ala. 22
Task Force Submissions, Idaho 22
Task Force Submissions, Miss. 22
Task Force Submissions, Va. 22
Texas Civil Rights Project, Courts Closed to Justice: A Survey of Courthouse Accessibility in Texas for People with Disabilities (1996) 23
Theresia Degener & Gerard Quinn, A Survey of International, Comparative, and Regional Disability Law Reform, *in* Disability Rights Law and Policy: International and National Perspectives (Mary Lou Breslin et al. eds., 2002) 11
U.S. Comm'n on Civil Rights, Accommodating the Spectrum of Individual Abilities (1983) ..... passim
United Kingdom Disability Discrimination Act 1995 11

Regulations

28 C.F.R. § 35.151(c) 2
28 C.F.R. § 35.130(d) 39

28 C.F.R. § 35.150 39
28 C.F.R. § 35.150(a) ..... passim
28 C.F.R. § 35.150(a)(2) 31
28 C.F.R. § 35.150(a)(3) 3, 31
28 C.F.R. § 35.150(b) 2, 31
28 C.F.R. § 35.150(b)(1) 2, 8, 31
28 C.F.R. § 35.150(b)(7) 39, 49
28 C.F.R. § 35.150(c) 3, 31
28 C.F.R. § 35.150(d)(1) 3
28 C.F.R. § 35.151(a) 2, 31
28 C.F.R. § 39.150 (1989) 2
28 C.F.R. § 41.58 (1989) 2

Constitutional Provisions

U.S. Const., amend. I ..... passim
U.S. Const., amend. VI 8
U.S. Const., amend. XI 32
U.S. Const., amend. XIV ..... passim
U.S. Const., amend. XIV, § 5 ..... passim

STATEMENT

I. The Statutory Scheme

This case involves disabled citizens' basic civil right of access to the state courts of justice. Title II of the Americans with Disabilities Act (ADA) generally prohibits any "public entity"—including state governments—from "subject[ing]" any "qualified individual with a disability" to "discrimination." 42 U.S.C. § 12132. Rather than adopt more detailed statutory provisions to give content to that general prohibition (as it did in Titles I and III of the ADA), Congress directed the Attorney General to flesh out that prohibition by adopting regulations that would incorporate various requirements previously applied under the Rehabilitation Act of 1973. See *id.* § 12134. The Attorney General duly promulgated those regulations, which became effective January 26, 1992, eighteen months after the statute's enactment. See 56 Fed. Reg. 35694 (1991). The basic obligations Title II imposes on states stem from those regulations.

The regulations, as relevant here, impose a requirement of accessibility on state activities. Like the earlier regulations that implemented the Rehabilitation Act of 1973, the Title II regulations governing physical accessibility sharply distinguish between new and existing facilities.[1] For

---

[1] See 42 U.S.C. § 12134(b) (directing the Attorney General to follow the Rehabilitation Act regulations in this regard). Title III of the ADA, which covers private places of public accommodation, draws a similar distinction between new construction and existing facilities for accessibility purposes. Compare 42 U.S.C. § 12183(a)(1) (imposing "readily accessible" standard on new construction) with *id.* § 12182(b)(2)(A)(iv) (requiring removal of structural barriers in existing facilities only when doing so is "readily achievable"). Cf. 1 House Comm. on Educ. & Labor, Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act 357 (1990) (hereinafter 'Leg. Hist.") (House

facilities on which "construction was commenced after January 26, 1992," a stringent standard of accessibility applies: Each such facility must be "readily accessible to and usable by individuals with disabilities," 28 C.F.R. § 35.151(a), and generally must satisfy a detailed set of accessibility guidelines, see *id.* § 35.151(c). The strict standard applied to new construction draws from the relevant Rehabilitation Act regulations, see 28 C.F.R. § 41.58 (1989), and rests on the premise that accessibility features are exceptionally inexpensive when incorporated in a facility's initial design. See 1 Leg. Hist., *supra*, at 187 (Senate comm. report).

For facilities already in existence in 1992, the Title II regulations follow the earlier Rehabilitation Act regulations, see 28 C.F.R. § 39.150 (1989), in taking a more lenient approach. Instead of demanding that *each building* in the state be readily accessible, the existing-facility provisions require only that a state "operate each service, program, or activity so that the service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a) (emphasis added). The regulations emphasize that public entities need not "make structural changes in existing facilities where other methods are effective in achieving compliance" with the program accessibility mandate. *Id.* § 35.150(b)(1). Rather, states have a variety of ways of complying with that mandate, including:

> such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any

committee report) (prohibitions imposed by Title II regulations should track those imposed by Titles I and III).

> other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities.

Id. States need not take any action that "would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." *Id.* § 35.150(a)(3). See also *id.* ("action that would threaten or destroy the historic significance of an historic property" not required).

In recognition of the fact that Title II's mandate might nonetheless require states to make physical alterations to some existing buildings (as we contend were required here), states may take advantage of several provisions that address the need for an orderly transition to compliance. Each public entity, by January 26, 1993, was to "evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and . . . proceed to make the necessary modifications." 28 C.F.R. § 35.105(a). Where "structural changes to facilities" were necessary to achieve compliance, states were to "develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes." *Id.* § 35.150(d)(1). And "[w]here structural changes in facilities are undertaken to comply" with the accessibility requirement, the regulations provided that "such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible." *Id.* § 35.150(c). The events that form the basis for this case all occurred more than four years after that January 1992 effective date. See Pet. App. 15-17, 19-20.

II. The Facts

The six named plaintiffs[2] were denied the opportunity to participate effectively in Tennessee court proceedings

[2] Two of these plaintiffs, George Lane and Beverly Jones, were named in the original complaint and are Respondents here.

because the state's courthouses were not physically accessible to individuals with disabilities. In 1996, at roughly the same time as the events underlying this case, the Commission on the Future of the Tennessee Judicial System reported that "[f]or persons with significant physical or mental impairment, the system can be quite literally inaccessible." Comm'n on the Future of the Tenn. Judicial Sys., Final Report 31 (1996). When the original complaint was filed in 1998, plaintiffs identified courthouses in 23 Tennessee counties that were not physically accessible to individuals with mobility disabilities. Pet. App. 22. The experience of the plaintiffs—one of whom was arrested for failure to appear when he refused to crawl up the steps of an inaccessible courthouse to attend a hearing in the criminal case in which he was a defendant—illustrates the consequences of that inaccessibility.

1. George Lane—In September 1996, Respondent George Lane was compelled to appear at the Polk County courthouse to answer a set of criminal charges the state had filed against him. Pet. App. 15. Due to extensive injuries he had suffered in an automobile accident, Lane used a wheelchair for mobility; he could neither walk nor climb stairs. *Id.* 13. Because all proceedings in that courthouse occurred on the second floor, and the building had no elevator, Lane was required to abandon his wheelchair and literally crawl up the steps in order to appear in court. *Id.* at 15. Following his arraignment, Lane was summoned to appear at an October hearing in the same courtroom. *Id.* Lane duly arrived at the courthouse but sent word to the trial

---

See Pet. App. 12. After the state took its interlocutory appeal from the denial of the motion to dismiss, the district court granted two separate motions to join the others—Dennis Cantrel, Ann Marie Zappola, Ralph E. Ramsey, Sr., and A. Russell Larson—as party plaintiffs. (Respondents have moved for leave to lodge the motions and court orders.) Because this case arises on a motion to dismiss, allegations in the complaint must of course be taken as true and read in the light most favorable to the plaintiff.

judge that he refused to go through the humiliation of crawling up the courthouse steps again, nor would he put his safety at risk by allowing court employees to carry him. *Id.* On the order of the trial judge, Lane was arrested and jailed for failure to appear. *Id.*

Subsequent proceedings in Lane's criminal case occurred in the same inaccessible courthouse. At those proceedings, Lane typically waited at the bottom of the stairs while his attorney shuttled back and forth to the courtroom. Pet. App. 16. As a result, the court conducted proceedings, including discussing the course of future proceedings and the possibility of a change of venue, out of Lane's presence.[3] When an arraignment hearing was called in the second-floor courtroom after a new misdemeanor indictment was returned in March 1997, Lane's attorney requested that the court dismiss or at least stay proceedings until accessible facilities could be provided. Pet. App. 16. The trial court denied the motion; the judge suggested that Lane might have a right to bring an independent civil suit to make the courthouse accessible, but that inaccessibility was no basis for delaying or dismissing the pending criminal case. See 3/17/97 Tr. 5. The Tennessee appellate courts declined to accept jurisdiction over Lane's request for extraordinary relief. Pet. App. 16-17. Proceedings were subsequently stayed in Lane's criminal case, *id.* at 17, and Lane ultimately pleaded guilty to a single charge of driving on a revoked license.

2. Beverly Jones—Respondent Beverly Jones has paraplegia and uses a wheelchair for mobility. Pet. App. 19. She works for parties to judicial proceedings as a certified court reporter, but because courthouses in many Tennessee counties are inaccessible, her opportunity to perform her work

---

[3] The court held one proceeding (the preliminary hearing) in a location (the ground-floor library) that was accessible to Lane but generally inaccessible to the public. Pet. App. 16; cf. *Waller* v. *Georgia*, 467 U.S. 39, 48 (1984) (criminal defendant has constitutional right to public suppression hearing).

has been significantly impeded. *Id.* at 19-20. She has specifically requested modifications to the courthouses in four Tennessee counties, but none has been made accessible to her. *Id.* 20.

3. Ann Marie Zappola, Ralph E. Ramsey, Sr., Dennis Cantrel, and A. Russell Larson—Plaintiffs Ann Marie Zappola, Ralph E. Ramsey, Sr., Dennis Cantrel, and A. Russell Larson similarly were excluded from core state programs held at inaccessible Tennessee courthouses. Zappola has a spinal cord injury that makes it extremely painful if not impossible for her to climb stairs. Motion for Permissive Joinder of Cantrell *et al.* 6. In two cases in 1997 and 1998 (a civil proceeding in which she was a defendant, and a juvenile proceeding in which she was the complainant), Zappola was forced to climb the steps to the third floor of the Houston County Courthouse to attend proceedings. *Id.* at 6-7. Ramsey, who has a venous condition that makes him unable to climb stairs, was likewise a defendant in a civil proceeding. *Id.* at 8-9. When he arrived at the Cocke County Courthouse for a hearing on that case in 1995, Ramsey discovered that the courtroom was located on the second floor, up a flight of stairs; although Ramsey sent word that he was in the courthouse but could not get to the courtroom, the trial court entered judgment against him for failure to appear. *Id.* at 9. Cantrel, who has paraplegia, was forced to crawl up the stairs of the Fayette County Courthouse to attend a County Commission meeting. *Id.* at 3. And Larson, an attorney with a condition that makes it "difficult to impossible to climb stairs," Motion for Permissive Joinder of Larson 2, was required to provide pretrial representation to his clients in first-floor courthouse hallways and was unable to provide effective representation to clients whose cases went to trial, *id.* at 2-3.

III. Proceedings Below

Respondents filed this suit on August 10, 1998, against the State of Tennessee and a number of counties. Pet.

App. 12. Suing on their own behalf and as representatives of a class of persons denied access to the state's courthouses because of their disabilities, *id.* 25-27, respondents alleged that the defendants had violated Title II of the ADA by maintaining inaccessible courthouses, *id.* 23-25. They sought both damages and injunctive relief. *Id.* 27-28.

The state moved to dismiss on Eleventh Amendment grounds, the district court denied the motion, Pet. App. 7, and the state took an interlocutory appeal. The Sixth Circuit affirmed on the basis of *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002), which held that Title II validly abrogates state sovereign immunity in cases in which the statute enforces due process principles. As amended on rehearing, the Sixth Circuit's opinion here explained that respondents were "seeking to vindicate" their due process "right of access to the courts in Tennessee." Pet. App. 5. The court therefore affirmed the denial of the motion to dismiss and remanded for further proceedings. *Id.*

SUMMARY OF ARGUMENT

Unlike Title I of the Americans with Disabilities Act (ADA)—the employment discrimination title that was at issue in *Board of Trustees* v. *Garrett*, 531 U.S. 356 (2001)—Title II of the statute directly implicates the core rights of citizenship. *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). In the courthouse access context of this case, the constitutional concerns are particularly powerful, for courts that are inaccessible to people with disabilities threaten to violate an array of constitutional rights.

Because the court of appeals limited its analysis to the courthouse access context, and this Court can resolve this case without going further, we begin by focusing on the clear Section 5 justification for applying Title II to demand access to the state's court system. But the constitutional concerns addressed by the statute extend well beyond the narrow context of this case. Title II protects people with disabilities

against violations of constitutional rights in numerous areas of state government. Whether considered in its application to courthouse access or more broadly, Title II is a congruent and proportional response to actual and threatened violations of the Fourteenth Amendment. *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997).

I. Congress clearly had power under Section 5 of the Fourteenth Amendment to require the State of Tennessee to assure that its court system, "when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). When a state maintains courts that are *not* accessible to people with disabilities, the state's actions threaten an array of constitutional rights under the First, Sixth, and Fourteenth Amendments that impose far more than rational-basis scrutiny on states. Both at the time the ADA was enacted and today, inaccessible courts have threatened to violate these rights of individuals with disabilities throughout the Nation. A variety of sources—legislative testimony, published studies, litigation records, and the Department of Justice's enforcement reports—demonstrate that the problem was and remains widespread.

Title II responds directly to the threat inaccessible courts pose to constitutional rights. It requires that court programs be accessible, a standard that can often be satisfied without making structural changes to existing facilities. See 28 C.F.R. § 35.150(a), (b)(1). If, as here, the lack of accessible court programs in a given county renders the state's court system not "readily accessible to and usable by" disabled citizens in that county, 28 C.F.R. § 35.150(b)(1) [please confirm], that is precisely the circumstance in which individuals with disabilities are most likely to experience violations of their constitutional rights. To the limited extent that this "program accessibility" requirement imposes obligations that go beyond those imposed by the Constitution itself, that additional margin is fully justified as a reasonably prophylactic measure given the substantial record of widespread courthouse inaccessibility.

II. Because Congress clearly had power to impose the "program accessibility" requirement on states in the courthouse access context of this case, this Court need go no further to uphold the statute as applied here. See *Salinas* v. *United States*, 522 U.S. 52, 60-61 (1997); *Griffin* v. *Breckenridge*, 403 U.S. 88, 104 (1971); *United States* v. *Raines*, 362 U.S. 17, 24-25 (1960). But even when considered more broadly, ADA Title II is proper Section 5 legislation. Unlike Title I of the statute—which equally barred employment discrimination in the public and private sectors—Title II focuses specifically on governmental conduct and was enacted on the basis of a weighty record of actual and threatened constitutional violations by states in a wide range of nonemployment areas. In many of these areas, the state is subject to constitutional constraints that impose more than rational-basis scrutiny. Even in instances where the state's conduct is ordinarily subject only to rational-basis scrutiny, Congress had ample reason to believe that applying Title II was necessary both to dismantle the widespread exclusion of people with disabilities that has effectively marked them as second-class citizens, cf. *Saenz* v. *Roe*, 526 U.S. 489, 506-07 (1999), and to stop the "mutually reinforcing stereotypes" that have "created a self-fulfilling cycle of discrimination." *Nevada Dep't of Human Resources* v. *Hibbs*, 123 S. Ct. 1972, 1982 (2003).

ARGUMENT

Unlike Title I of the Americans with Disabilities Act (ADA), which deals exclusively with employment discrimination, Title II of the ADA responds to a widespread denial of core rights and obligations of citizenship protected by the Constitution. By guaranteeing that people with disabilities will not be systematically shut out of the opportunity to participate in, influence, and seek redress from their state governments, the statute enforces a principle that this Court has deemed "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal

protection"—"the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). Unlike ADA Title I, which implicates no fundamental rights and therefore involves conduct that triggers only rational-basis scrutiny, see *Garrett*, 531 U.S. at 365-68, Title II affects an array of conduct in which states have heightened constitutional obligations. Congress thus had broader latitude to craft a remedy than in Title I's employment context. See *Hibbs*, 123 S. Ct. at 1982.

The courthouse access context implicates these fundamental constitutional rights in an especially powerful way. Courthouses are the locations in which individual citizens often have their most important and extensive contacts with the government. In rural communities like the ones in which this case arose, the local courthouse is often the focal point of civic life. Wherever located, courthouses sit at the nexus of an array of rights and obligations of citizenship, including the opportunity to seek redress as litigants, to testify as witnesses, to participate as jurors, and to observe proceedings as members of the interested public. When a state's courthouses are inaccessible to individuals with disabilities, the state's actions effectively create a class of persons who are denied access to core privileges of citizenship. Such a result is intolerable under a Constitution that "'neither knows nor tolerates classes among citizens.'" *Romer*, 517 U.S. at 623 (quoting *Plessy* v. *Ferguson*, 163 U.S. 537, 539 (1896) (Harlan, J., dissenting)); cf. *Saenz*, 526 U.S. at 506-07 (Fourteenth Amendment's Citizenship and Privileges or Immunities Clauses do not allow for degrees of citizenship or a hierarchy among citizens).

Both the state and its *amici* reassure the Court that their position does not call into question the ultimate constitutionality of Title II; all that supposedly is at issue is whether Congress can properly impose a damages remedy on states that have violated the statute. See Pet. Br. 15-16; Ala. Br. 25-26. But the reassurances of the state and its *amici* ring

hollow. If this Court rules that Title II cannot be supported by a sufficient Fourteenth Amendment predicate, the statute will provide no basis for *any* relief—damages *or* an injunction—unless it can be upheld under Congress's Article I commerce power. In their brief before this Court, the State's *amici* pointedly refuse to concede that the commerce power supports Title II. See Ala. Br. 5 (noting that an injunctive remedy exists for Title II violations only "assuming [Title II] is a valid exercise of Congress's Article I power"); *id.* 22, 25 (same). And a number of states have recently challenged the Commerce Clause basis for the statute. See *Thompson* v. *Colorado*, 278 F.3d 1020, 1025 n.2 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002); *State* v. *Rendon*, 832 So. 2d 141, 146 n.5 (Fla. Dist. Ct. App. 2002), rvw. denied, 851 So. 2d 729 (Fla. 2003); *Meyers* v. *Texas*, No. 02-50452 (5th Cir.) (pending); *Doe* v. *Regier*, No. 03-2794 (Fla. Dist. Ct. App.) (pending); *McCarthy* v. *Hale*, No. 03-50608 (5th Cir.) (pending). Of particular importance, the applications of Title II that come closest to the core of Congress's Fourteenth Amendment power—those guaranteeing participation in such quintessential activities of self-government as voting, jury service, and the like—are precisely those that are least likely to be sustained under the Commerce Clause. For all intents and purposes, then, petitioner is mounting a facial challenge to the basic constitutionality of Title II.

A ruling that Title II exceeds Congress's authority would invalidate the very "'milestone on the path to a more decent, tolerant, progressive society'" that the State purports to endorse.[4] Pet. Br. 15-16 (quoting *Garrett*, 531 U.S. at 375

---

[4] Since passage of the ADA, laws requiring accessibility have become common outside the United States according to a study undertaken by the United Nations in 1996, more than 60 of the 85 respondents had some sort of legislation in place to ensure accessibility of public places to the disabled. D. Michailakis, Government Action on Disability Policy: A Global Survey (1997).

(Kennedy, J., concurring)). Fortunately, Title II fully meets the state's constitutional challenge. The statute directly enforces core Fourteenth Amendment rights—particularly where, as here, plaintiffs seek nothing more than access to the state's courts. This Court should thus uphold Title II as proper Section 5 legislation. Because the court of appeals focused its analysis on the courthouse access context, and this Court can resolve this case without going beyond that context, we begin by showing that Congress plainly had Section 5 power to require states to make their court systems accessible. As we demonstrate, however, Title II as a whole is a proper exercise of Section 5 authority as well.

I. Title II's Requirement That State Courts Be Accessible To People With Disabilities Reasonably Protects Against Violations Of Disabled Citizens' Rights Of Access To The Courts

This Court has held that Congress has power under Section 5 of the Fourteenth Amendment to enact "reasonably prophylactic legislation" that responds to actual or threatened constitutional violations, *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 88 (2000), so long as there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520. Applying that test, Congress had ample authority to impose Title II's requirement of program accessibility on state court systems. Inaccessible courts threaten an array of constitutional rights, and the program

---

Australia, for example, requires that facilities be accessible to the disabled, unless doing so would cause an undue hardship. See Disability Discrimination Act of 1992, § 23; see also United Kingdom Disability Discrimination Act 1995, §§ 19-21. See generally Theresia Degener & Gerard Quinn, A Survey of International, Comparative, and Regional Disability Law Reform, *in* Disability Rights Law and Policy: International and National Perspectives 3, 19, 20, 29-34 (Mary Lou Breslin et al. eds., 2002).

accessibility requirement, when considered in the light of the nationwide problem of inaccessible courthouses, is reasonably calculated to prevent the constitutional harm without unduly impinging on state interests.

A. Inaccessible Courts Threaten An Array Of Constitutional Rights

In determining whether Congress has properly exercised its Section 5 authority, the "first step" is to identify the constitutional rights Congress has sought to enforce. *Garrett*, 531 U.S. at 365. Where Congress regulates state conduct that implicates ordinary rational-basis scrutiny, this Court accords the legislature comparatively little latitude to craft prophylactic legislation. See *Garrett*, 531 U.S. at 367; *Kimel*, 528 U.S. at 86. Where, by contrast, Congress seeks to regulate state conduct that implicates heightened constitutional obligations, this Court has recognized that the legislature must have a substantially wider area in which to act. See *Hibbs*, 123 S. Ct. at 1982 (according Congress greater leeway because "the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test").

The statutory obligation at issue in this case implicates a variety of fundamental constitutional rights that impose far more than a rational-basis requirement on states. Plaintiffs here seek to enforce the requirement that the state operate a court system that, "when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). When a state violates that requirement by conducting its judicial proceedings in courthouses that are inaccessible, the state threatens an array of constitutional rights secured by the Fourteenth Amendment to both its disabled and its nondisabled citizens. Where, as here, disabled citizens in a number of counties lack ready access to the state's courts because judicial proceedings are held in inaccessible courthouses, and people with disabilities are compelled to appear as litigants in inaccessible courtrooms,

the state's actions threaten to shut out an entire class of citizens from a range of civic rights and obligations simply because those citizens have disabilities.

At the most basic level, such inaccessible courts threaten the core right of individuals with disabilities to seek the "protection of the laws" by invoking the proceedings of courts for redress. Cf. *Romer*, 517 U.S. at 633 (equal protection requires "that government *and each of its parts* remain open on impartial terms to all who seek its assistance") (emphasis added). And they threaten the related First Amendment right "to petition the Government for redress of grievances," which includes a "right of access to the courts." *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 525 (2002) (internal quotation marks omitted); cf. *City of Boerne*, 521 U.S. at 519 (Section 5 gives Congress power to enforce incorporated Bill of Rights protections).

Inaccessible courthouses prevent individuals with disabilities from invoking protections of the law that are available only in court. The experience of plaintiff Zappola provides an example. In order to initiate legal proceedings by swearing out a juvenile-court complaint, she was required to bring herself to a third-floor courtroom in an inaccessible courthouse. See p. 6, *supra*. Zappola's experience is hardly unusual. Individuals with disabilities who seek to obtain restraining orders against those who threaten violence against them will also be unable to obtain the protection of the laws if the court system is inaccessible, as will those individuals with disabilities who seek to testify as victim-witnesses in criminal trials. As the California Attorney General's Commission on Disability noted in 1989, the inability to testify and seek redress is a particularly salient issue for many individuals with disabilities, whose impairments make them especially vulnerable targets of abuse or predation. See Attorney General's Comm'n on Disability, Final Report 101-02 (1989) (finding that victims and witnesses with disabilities encounter "significant barriers to due process and just treatment" because, *inter alia*, many courtrooms are inaccessible). One

witness in the congressional hearings on the proposed ADA, a woman with quadriplegia who had "experienced many crimes," described the constitutional harm she experienced because of her inability to obtain the law's protection: "I live in fear of crime because equal protection under law is not seen as a right of Americans with disabilities because Americans with disabilities are seen as natural victims rather than equal citizens." 2 Leg. Hist., *supra*, at 1196-97 (Cynthia Miller).

The opportunity to testify and seek redress in the courts was a primary aspect of the "protection of the laws" that the Fourteenth Amendment's drafters sought to guarantee to all persons. See *Reynolds* v. *Sims*, 377 U.S. 533, 597 (1964) (Harlan, J., dissenting) (quoting Thaddeus Stevens's speech opening debate on the Fourteenth Amendment in the House of Representatives). The shutting out of an entire class of citizens from such a core means of obtaining legal protection makes that class, in a real sense, "a stranger to [the state's] laws." *Romer*, 517 U.S. at 635.[5]

Inaccessible courts also threaten the rights of litigants with disabilities, guaranteed by the Sixth Amendment and the Due Process Clause, to be present at and participate meaningfully in a range of court proceedings. This Court has

---

[5] It is irrelevant that the denial of the protection of the laws in such circumstances may be unintentional. Discriminatory purpose is not required to make out an equal protection violation in fundamental rights contexts. See *Bush* v. *Gore*, 531 U.S. 98, 105-06 (2000) (per curiam) (requirement that election officials discern intent of the voter violates equal protection because of lack of safeguards to assure that ballots are counted in a uniform manner, even absent any indication of purpose that the requirement be applied in a *dis*uniform manner). In the access to courts context specifically, this Court has recognized both that no purposeful discrimination requirement applies and that states may be required to shoulder some financial burden to guarantee access. See *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 125-27 (1996).

held, for example, that both the Sixth Amendment's Confrontation Clause and the due process guarantee of a fair trial give criminal defendants the "right to be present at all stages of the trial where [their] absence might frustrate the fairness of the proceedings." *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975).[6] Under this Court's line of cases running from *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), through *M.L.B.*, *supra*, moreover, states have an obligation to facilitate the presence of litigants who are compelled to participate in many *civil* proceedings—at least where such presence is necessary to provide a "meaningful opportunity to be heard." *Boddie*, 401 U.S. at 379. In many cases, this constitutional obligation requires states to bear some cost to facilitate access, at least where doing so imposes no "undue burden on the State." *M.L.B.*, 519 U.S. at 122; see *id.* at 124 (state must waive fee requirement for obtaining appellate transcript in termination of parental rights proceeding);

[6] The state's *amici* note that this right is not absolute. Ala. Br. 14-15. They cite cases that hold that "'the privilege [of personally confronting witnesses] may be lost by consent or at times even by misconduct,'" *Illinois* v. *Allen*, 397 U.S. 337, 342-43 (1970) (quoting *Snyder* v. *Massachusetts*, 291 U.S. 97, 106 (1934)), and that courts may override the Sixth Amendment's requirement of face-to-face confrontation "where denial of such confrontation is necessary to further an important public policy." *Maryland* v. *Craig*, 497 U.S. 836, 850 (1990); see *id.* at 857 (finding that standard satisfied by the state's interest in "protect[ing] a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate"). But these narrow, case-by-case exceptions to the general right of courtroom presence are a far cry from the broad inability to attend court proceedings imposed by an inaccessible court system—a denial of the right to presence that is imposed, not because of any fault of the defendant or overriding public policy, but simply because of the constitutionally irrelevant fact that the defendant has a disability.

Boddie, 401 U.S. at 380-81 (state must waive filing fee requirement for divorce proceeding).

When courts are inaccessible, criminal defendants and participants in important civil proceedings face a serious risk that they will be unable effectively to protect their interests in the litigation simply because of their disabilities.[7] The experience of respondent Lane, who was arrested for failure to appear when he could not ascend the stairs to attend his pretrial hearing, provides a particularly dramatic example. See p. 4-5, *supra*. But Lane's experience is not atypical. Plaintiff Ramsey had a similar experience when he was a defendant in a civil proceeding: a default judgment was entered against him when he could not ascend the stairs to the courtroom in which the case was being heard. See p. 6, *supra*.

And inaccessible courts do not simply exclude individuals with disabilities from participation as *litigants*; they also operate to bar such individuals from the civic right and obligation of jury service. Although individuals with disabilities might be properly excused from the jury pool on a case-by-case basis, a court system that broadly excludes people with a class of impairments from jury service violates core Sixth Amendment principles. This Court has held that "excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975).

It is not just criminal defendants who suffer when inaccessible courts deny people with disabilities the opportunity to participate as jurors; disabled would-be jurors experience constitutional harm as well. "Jury service is an exercise of responsible citizenship by all members of the

[7] As plaintiff Larson's experience demonstrates, inaccessible courts can also deny criminal defendants who choose to be represented by attorneys with disabilities their Sixth Amendment right to the counsel of their choice. See, *e.g.*, *Wheat* v. *United States*, 486 U.S. 153, 159 (1988).

community, including those who otherwise might not have the opportunity to contribute to our civic life." *Powers* v. *Ohio*, 499 U.S. 400, 402 (1991). "Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity for participation in the democratic process." *Id.* at 407. By denying them the opportunity to participate in such a core aspect of citizenship, the exclusion of people with disabilities from jury service "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Olmstead* v. *L.C.*, 527 U.S. 581, 600 (1999). No more than a state could deny individuals with disabilities the right to vote by refusing to provide accessible polling places, a state may not deny individuals with disabilities the right to jury service by refusing to provide accessible courthouses. Cf. *M.L.B.*, 519 U.S. at 123-24 (stating that the right to vote or run for office cannot be limited by the ability to pay for a license, even if the fee provides the state needed revenue).

Finally, inaccessible courts also prevent a large class of individuals with disabilities from attending court proceedings as members of the interested public. This Court's cases make clear both that members of the public have a First Amendment right to attend criminal proceedings, and that criminal defendants themselves have a Sixth Amendment right to public access to the proceedings in which they participate. See *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 8-15 (1986) (First Amendment right of public to access proceedings); *Waller* v. *Georgia*, 467 U.S. at 46 (Sixth Amendment right of defendant to public access). The state's *amici* assert that these guarantees are satisfied so long as members of the public are *generally* allowed to attend proceedings; there is, in *amici*'s words, no "individualized personal right to attend trial." Ala Br. 13 n.3.[8] That assertion

[8] *Amici* also assert that the First Amendment right of public access triggers only rational basis scrutiny. Ala. Br. 13 n.3. To the contrary, this Court has made clear that the right of public access to court proceedings "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest," *Press-Enterprise*, 478 U.S. at 9 (internal quotation marks omitted)—a standard the Court has expressly labeled "strict scrutiny," *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 607 n.17 (1982).

is doubly flawed. First, *amici* ignore this Court's explanation that the First Amendment right of access to court proceedings "serves to ensure that the *individual citizen* can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co.*, 457 U.S. at 604 (emphasis added). Second, the exclusion of a broad class of individuals from a broad array of judicial proceedings simply because of those individuals' disabilities—the inevitable consequence of an inaccessible court system—goes much farther than the isolated denial of an individual's chance to attend a particular hearing. Citizens with disabilities, like those without them, have a "fundamental, natural yearning to see justice done," *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 571 (1980) (opinion of Burger, C.J.)—one that cannot be satisfied if they are categorically unable to attend court proceedings.

From the foregoing, it should be clear that the maintenance of courts that are inaccessible to individuals with disabilities operates to exclude a large class of persons from the exercise of many core rights and obligations of citizenship and puts an array of constitutional rights at risk. This case is therefore decisively unlike *Garrett*, which involved ADA Title I. Title I applies to state governments only when they act in their capacity as employers—a context in which the state's decisions are judged only by the deferential rational-basis test. See *Garrett*, 531 U.S. at 366-68; cf. *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 676 (1996) ("'[T]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a

relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.'") (quoting *Waters* v. *Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion)). Here, by contrast, plaintiffs invoke Title II in a context in which the states have heightened constitutional obligations to their citizens.

B. There Is A Significant Pattern Of Inaccessible Courts Throughout The States

The threat to constitutional rights posed by inaccessible courts is not merely theoretical. At the time Congress adopted the ADA, inaccessible courthouses were a major problem across the Nation--and significant problems remain even today. There is thus a substantial "history and pattern" of state constitutional violations. *Garrett*, 531 U.S. at 368. Particularly given the heightened constitutional interests at stake, see *Hibbs* 123 S. Ct. at 1982, that pattern is more than sufficient to support Title II's requirement that court systems be accessible to individuals with disabilities.

1. The record Congress compiled in developing the ADA makes clear that courthouses throughout the country were inaccessible at the time of the statute's enactment. A Civil Rights Commission report that provided much of the basis for Congress's consideration of the statute declared that seventy-six percent of all state buildings open to the general public were inaccessible to people with disabilities. U.S. Comm'n on Civil Rights, Accommodating the Spectrum of Individual Abilities 39 (1983). Congress had every reason to conclude that courthouses were no exception.[9] Hearings held

[9] Many of the examples Respondents cite involve courts that are designated "local" or "county" courts. But although *Garrett* declined to attribute localities' acts of *employment* discrimination to the states for purposes of the Eleventh Amendment abrogation analysis, see *Garrett*, 531 U.S. at 368-69, the inaccessibility of proceedings at nominally "local" courts *is* properly attributed to the states for those purposes. "County," "City," and "Municipal" courts are frequently held to be arms of the state entitled to

by congressional committees and by the congressionally designated Task Force on the Rights and Empowerment of Americans with Disabilities[10] discussed inaccessible

Eleventh Amendment immunity. See, *e.g.*, *Callahan* v. *City of Philadelphia*, 207 F.3d 668, 670-74 (3d Cir. 2000) (Pennsylvania Municipal Courts are arms of the state); *Kelly* v. *Municipal Courts*, 97 F.3d 902, 907-08 (7th Cir. 1996) (Marion County, Indiana, Municipal Court is arm of the state); *Franceschi* v. *Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995) (California Municipal Courts are arms of the state); *Jernigan* v. *Superior Court*, No. C03-2530WHA(PR), 2003 WL 21640489 at *1 (N.D. Cal. July 7, 2003) ("The Superior Court for Santa Clara County is an arm of the state and thus under the Eleventh Amendment cannot be sued in federal court."). Even when such courts are not in and of themselves arms of the state, their failure to provide access to proceedings that adjudicate rights established by state law—and that frequently result in confinement in a state prison—is surely attributable to the state for Eleventh Amendment purposes. Cf. *Carter* v. *City of Philadelphia*, 181 F.3d 339, 352-53 (3d Cir. 1999) (county prosecutors are state agents for Eleventh Amendment purposes when they bring prosecutions to enforce state law, although they are county agents when they manage their own offices), cert. denied, 528 U.S. 1005 (1999); *Esteves* v. *Brock*, 106 F.3d 674, 678 (5th Cir.) (in Texas, "when acting in the prosecutorial capacity to enforce state penal law, a district attorney is an agent of the state [for § 1983 purposes], not of the county in which the criminal case happens to be prosecuted," though district attorney is a county agent for other purposes), cert. denied, 522 U.S. 828 (1997); *Pusey* v. *City of Youngstown*, 11 F.3d 652, 658 (6th Cir. 1993) (local prosecutor, though a city employee, "acts as a state agent [for § 1983 purposes] when prosecuting state criminal charges"), cert. denied, 512 U.S. 1237 (1994).

[10] Although the *Garrett* Court noted, 531 U.S. at 370, that testimony submitted to the Task Force was not submitted "directly to Congress," it did not disregard that evidence. See *id.* at 371 n.7 (considering evidence before Task Force and discounting it because, *inter alia*, nearly all of it related to discrimination by states outside of the employment context). Nor could the Court properly have done so, for the Task Force was a body specifically

courthouses and court proceedings in at least eighteen states—including Tennessee.[11]

Even today, thirteen years after enactment of the ADA, there is ample evidence that the problem of inaccessible courthouses persists in every corner of the Nation. Published studies have identified serious and pervasive denials of accessibility in a number of state court systems. In Tennessee, the state's own commission on the future of its judicial system warned in 1996 that "[f]or persons with physical or mental impairment, the system can be quite literally inaccessible." Comm'n on the Future of the

---

appointed by the chair of a congressional subcommittee of jurisdiction to gather facts regarding the proposed legislation. See 1 Leg. Hist., *supra*, at 300. The determination of the means by which Congress will inform itself regarding pending legislation is a core legislative prerogative under our Constitution's separation of powers. See *Buckley* v. *Valeo*, 424 U.S. 1, 137-38 (1976) (per curiam). See also *City of Boerne*, 521 U.S. at 531-32 ("As a general matter, it is for Congress to determine the method by which it will reach a decision.").

[11] See 2 Leg. Hist., *supra*, at 1070-71 (Massachusetts); *id.* at 1078-79 (Connecticut); *Americans with Disabilities Act of 1989: Hearings Before Senate Comm. on Labor & Subcom. on the Handicapped* 663-664 (1989) [hereinafter May 1989 Hearings] (Mary Lynn Fletcher) (Tennessee); Task Force Submissions, Ala. 0005, 0006, 0015; Task Force Submission, Cal. 0254; Task Force Submission, Col. 0273; Task Force Submission, Ga. 0374; Task Force Submission, Haw. 0496; Task Force Submissions, Idaho 0506, 0528; Task Force Submission, Mass. 0812; Task Force Submissions, Miss. 0990, 0998; Task Force Submission, Mo. 1015; Task Force Submission, Pa. 1394; Task Force Submission, S.D. 1475; Task Force Submissions, Va. 1663, 1668, 1674, 1676, 1678, 1679, 1680; Task Force Submission, Wash. 1690; Task Force Submission, W. Va. 1745; Task Force Submission, Wis. 1771; Task Force Submission, Wyo. 1786; see also 2 Leg. Hist., *supra*, at 1993 (reprinting *New York Times* article in which a lawyer with a disability described courtrooms as "often inaccessible").

Tenn. Judicial Sys., *supra*, at 31. Similar reports addressing courthouse accessibility in California, Florida, Missouri, New York, Texas, and Washington State have echoed that warning; those reports have often provided detailed accounts of the barriers faced by people with disabilities who seek to participate in court proceedings.[12]

---

[12] See Judicial Council of California, Public Hearings Report: Access for Persons with Disabilities at 5-68 to 5-79 (1996) (detailing numerous problems of physical accessibility throughout the state's courts); N.Y. State Comm'n on Qual. of Care for the Mentally Disabled & N.Y. State Bar Ass'n Comm. on Mental & Physical Disability, Survey of Access to N.Y. State Courts for Individuals with Disabilities 13 (1994) (finding based on a stratified, random sample of 275 New York courts that "only 8% of all courtrooms were fully accessible"; "only 30% of the courts provided accessible rest rooms"; and well over half lacked accessible parking spaces, proper signage, and accessible elevators); Burton D. Dunlop & Marisa E. Collett, Jury Service Accessibility for Older Persons and Persons with Disabilities in Florida, (study by Florida International University's Center on Aging concluding that "some of Florida's courts remain clearly out of compliance with some of the basic requirements for accommodating persons with disabilities"—*inter alia*, more than 40% of sampled courts did not have even a single accessible jury box); Phyllis S. Launius, Removing Public Access Barriers to the Courts in the New Millennium: A Sampling and Analysis of Missouri's Trial Courts 3-4 (2000) (study for the Missouri Office of State Courts Administrator finding "many barriers limiting access to those individuals with physical disabilities" and observing that "only 26 percent of this sample's accessed areas are compliant with ADA standards"); Texas Civil Rights Project, Courts Closed to Justice: A Survey of Courthouse Accessibility in Texas for People with Disabilities 4-5 (1996) (concluding that "the accessibility of courtrooms for jurors, litigants, members of the public, and attorneys with disabilities is abysmal and unjustifiable" in Texas courts, and discussing several widespread courthouse accessibility problems); Civil and Legal Rights Subcomm., Governor's Comm. on Disability Issues & Employment, Interim Court and Courthouse

In addition, there has been "extensive litigation," *Garrett*, 531 U.S. at 376 (Kennedy, J, concurring), challenging the lack of accessibility at courthouses across the country. In a number of these cases, plaintiffs have received final adjudications in their favor. See, *e.g.*, *Layton* v. *Elder*, 143 F.3d 469, 472 (8th Cir. 1999) (directing entry of injunction against inaccessible courthouse); *Matthews* v. *Jefferson*, 29 F. Supp. 2d 525, 533-34 (W.D. Ark. 1998) (granting summary judgment to plaintiff); *Kroll* v. *St. Charles County*, 766 F. Supp. 744, 752 (E.D. Mo. 1991) (concluding that inaccessible courthouse violated the Rehabilitation Act). Others have resulted in favorable settlements for plaintiffs, and still others remain at an earlier procedural stage.[13]

Because complaints filed by individual plaintiffs are not collected in any readily accessible centralized database, the cases cited above presumably represent only a fraction of the courthouse-access suits that have been brought since the effective date of the ADA. A richer picture comes from the

Access Project 1 (2000) (observing "that there are some serious access problems in the courts and courthouses in Washington" and that those problems "appeared to extend to all courts: Superior, Municipal, District, and Juvenile").

[13] See, *e.g.*, *Shotz* v. *Cates*, 256 F.3d 1077, 1080-81 (11th Cir. 2001) (plaintiffs stated claim for Title II violation based on inaccessible courthouse); *Salmond* v. *County of Teton*, No. CV-97-130-GF-LBE (D. Mont. Dec. 21, 2000) (consent decree in litigation regarding accessibility of Teton County Courthouse); *Davis* v. *Tuolumne County*, No. CV-F-97-5516-SMS (E.D. Cal.) (consent decree in litigation regarding accessibility of Tuolumne County Courthouse); *No Barriers, Inc.* v. *Cornelius*, No. 3:97CV-2330-R (N.D. Tex.) (settlement in litigation regarding accessibility of Ellis County Courthouse); *Jonas* v. *General Services Comm'n*, No. A-95-CV-468-JN (W.D. Tex.) (settlement in litigation regarding accessibility of building housing state Supreme Court and Court of Criminal Appeals); *Miles* v. *County of Los Angeles*, No. 02-CV-3932 DT (JTLx) (C.D. Cal.) (complaint challenging several inaccessible courthouses in Los Angeles County).

United States Department of Justice's published enforcement records. Those records demonstrate that the inaccessibility of courthouses is a nationwide problem. On its website, *http://www.usdoj.gov/crt/ada/enforce.htm*, the Department posts periodic status reports that provide a snapshot of its enforcement activities; it also posts the full text of selected settlement agreements. A review of the posted reports and agreements reveals over 120 instances in forty-one states (including at least six in Tennessee) in which state courts and court proceedings were inaccessible, and the court system agreed to make its facilities and proceedings more accessible only after the federal government intervened (typically in response to a citizen complaint). See App., *infra*. Given the limitations on the federal government's enforcement resources (and the fact that the Department of Justice's published status reports do not purport to be comprehensive), these enforcement actions likely represent only the tip of the iceberg. But they demonstrate in any event that courthouse inaccessibility is a problem of nationwide scope.

Particularly in light of the fundamental constitutional interests at stake in the denial of access to court proceedings, the widespread record of inaccessible courthouses across the country is more than "weighty enough to justify the enactment of prophylactic § 5 legislation." *Hibbs*, 123 S. Ct. at 1981. Through a variety of sources—legislative testimony, published studies, litigation records, and the Department of Justice's enforcement reports—the public record describes significant limitations in courthouse accessibility in nearly every state. Those limitations threaten the constitutional rights of disabled litigants, jurors, and members of the interested public. This is hardly a case in which Congress has sought to impose on states "an unwarranted response to a perhaps inconsequential problem." *Kimel*, 528 U.S. at 89; cf. *Garrett*, 531 U.S. at 369-70 (half-dozen incidents "fall far short of even suggesting" a "pattern of unconstitutional discrimination" against people with disabilities in state employment). Rather, Title II's requirement that court

programs be accessible to individuals with disabilities responds to the potent threat that inaccessible proceedings have posed and continue to pose to the constitutional rights of individuals with disabilities.

2. The continuing record of inaccessible courthouses throughout the country puts the lie to the assertion, made by both the state and its *amici*, that the existence of state laws requiring accessible construction made the ADA unnecessary. See Pet. Br. 16 n.2, 22; Ala Br. 22-24. To the contrary, Congress enacted the ADA based on the conclusion, given its own heading in the House Education and Labor Committee report on the bill, that "CURRENT FEDERAL AND STATE LAWS ARE INADEQUATE." 1 Leg. Hist., *supra*, at 320. The Civil Rights Commission had determined that "[d]espite . . . the fact that nearly every state has a statute prohibiting architectural barriers, such barriers continue to be a serious problem." U.S. Comm'n on Civil Rights, *supra*, at 38. And Congress even heard specific testimony regarding the failure of Tennessee's own law to guarantee access. See May 1989 Hearings, *supra*, at 663-64 (Mary Lynn Fletcher).

A recent, comprehensive study of state laws that purport to guarantee the accessibility of state facilities demonstrates that Congress had ample basis for finding those laws inadequate. The authors found that only twenty-three states had laws that "provided clear statutory language with protection comparable to ADA Title II," Ruth Colker & Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075, 1083 (2002)—even *after* (as petitioner's *amici* emphasize) twenty states responded to the ADA's passage by "enact[ing] new protections for the disabled or strengthen[ing] existing protections." Ala. Br. 24 & n.5. Cf. *Hibbs*, 123 S. Ct. at 1980 (discounting state family leave policies because "it was only since Federal family leave legislation was first introduced that the States had even begun

to consider similar family leave initiatives") (internal quotation marks and brackets omitted).[14] Most important here, the procedures for enforcing these accessibility laws against the states often range from the uncertain to the nonexistent. See Colker & Milani, *supra*, at 1087-92, 1102-18 (cataloging state statutes). Given these significant limitations in coverage and enforcement, it is no surprise that the statutes cited by the state and its *amici* have failed to solve the problem of courthouse inaccessibility, in Tennessee and throughout the country. Just as the "important shortcomings of some state policies" supported Congress's decision to impose a uniform requirement of family and medical leave, *Hibbs*, 123 S. Ct. at 1980, the many shortcomings of existing state accessibility laws gave Congress ample reason to believe that a uniform federal guarantee was necessary.

This Court has recognized that Congress may properly attend to the ways in which states' actual practices diverge from their formal policies. See *id.* ("evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways," supports Congress's adoption of a universal guarantee of family and medical leave); *South Carolina* v. *Katzenbach*,

---

[14] In their haste to sing the praises of states' "beneficen[ce]," Ala. Br. 22, the state's *amici* fall into self-contradiction. *Amici* first contend that Title II will stifle state enactment of broader protections for individuals with disabilities, because "enforcement of federal anti-discrimination law by way of private damages actions naturally tends to remove, or displace, the States' incentives to create their own such protections for their citizens." Ala. Br. 23. But on the *very next page* they tout the fact that "since the ADA's passage several States have enacted new protections for the disabled or strengthened existing protections." Ala. Br. 24 (citing 20 such states). Even if it were the province of the Court to consider such policy questions, it should be obvious from *amici*'s own argument that the enforcement of Title II has not displaced state protections for people with disabilities; it has spurred them into existence.

383 U.S. 301, 333-34 (1966) (Congress could properly prohibit state literacy tests, constitutional on their face, based on evidence that they had been discriminatorily administered). Tennessee and its *amici* therefore may not hide behind the formal guarantees of accessibility that appear on their statute books. Whatever Tennessee law may declare regarding the accessibility of public buildings, the simple fact remains that at the time this lawsuit was filed more than twenty county courts in the state remained inaccessible. As the evidence discussed above indicates, similar statements could be made about states throughout the Nation. Congress was entitled to conclude that the proof of any accessibility legislation lies in actual access, and that the widespread inaccessibility of state courts required a federal remedy.

C. Title II's Program Accessibility Requirement Is A Proportional Response To The Constitutional Violations Threatened By Inaccessible Courts

From the foregoing, it should be evident that Title II's requirement of accessibility in court proceedings is a "reasonably prophylactic" measure, *Kimel*, 528 U.S. at 88, that permissibly serves "to prevent and deter unconstitutional conduct," *Hibbs*, 123 S. Ct. at 1977. Although any given instance in which an individual is denied access to court proceedings might not violate the Constitution, cf. Ala. Br. 11-16 (arguing that inaccessible court proceedings are not always unconstitutional), a judicial system marked by inaccessible courthouses will likely violate the constitutional rights of litigants, witnesses, jurors, and the general public in a large number of cases. See *City of Boerne*, 521 U.S. at 532 (preventive measures satisfy Section 5 when "there is reason to believe" that much of the conduct they target has "a significant likelihood of being unconstitutional"). And the nationwide phenomenon of inaccessible courthouses—a phenomenon that persisted long after the Rehabilitation Act of 1973—demonstrates that Congress faced a "[d]ifficult and intractable problem[]" that "require[s] powerful remedies."

Kimel, 528 U.S. at 88. As the Senate committee report on the ADA noted, the Rehabilitation Act's requirement that the defendant program receive federal funds had proved burdensome and confusing to plaintiffs, thus limiting the statute's effectiveness. See 1 Leg. Hist., *supra*, at 110 (quoting Neil Hartigan). Contrary to the state's argument, Pet. Br. 35-36, this is quite clearly an area "where previous legislative attempts had failed" and "added prophylactic measures" were justified. *Hibbs*, 123 S. Ct. at 1982.

1. Title II's requirement of program accessibility is precisely targeted at those situations that are most likely to violate constitutional rights. That requirement is clearly violated when, as here, litigants with disabilities are compelled to attend proceedings in inaccessible courthouses, and the lack of accessible facilities in a given county renders the state's courts not "readily accessible to and usable by" disabled citizens in that county. 28 C.F.R. § 35.150(a). Such core violations of the program accessibility requirement are precisely the circumstances in which individuals with disabilities are most likely to be deprived of their constitutional rights of access to the courts. To the limited extent that this requirement imposes obligations that go beyond those imposed by the Constitution itself, its additional margin of protection is fully justified by the widespread record of inaccessible courthouses we discuss above. That requirement is "congruent and proportional to its remedial object, and can 'be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Hibbs*, 123 S. Ct. at 1984 (quoting *City of Boerne*, 521 U.S. at 532).

Amici appear to contend that Title II cannot be congruent and proportional unless each individual plaintiff who invokes the statute can show that the state actually violated his or her constitutional rights. See Ala. Br. 13-14 (denying that Jones's constitutional rights were violated); *id.*

15 (denying that Lane's constitutional rights were violated).[15] This Court has made clear, however, that "Congress 'is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment,' but may prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" *Hibbs*, 123 S. Ct. at 1983 (quoting *Kimel*, 528 U.S. at 81). The proper question is whether inaccessible courts sufficiently threaten constitutional rights that a requirement of accessibility in court programs operates as a "reasonably prophylactic" response. *Kimel*, 528 U.S. at 88. That standard is amply satisfied here.

---

[15] In any event, *amici* are simply incorrect about the facts of Respondents' cases. *Amici* emphasize the state judge's offer to hold Lane's *trial* in a different, accessible location. Ala. Br. 15. But the state offered Lane no alternative means of access before arresting him for failure to appear at a pretrial hearing (other than the unsafe and humiliating suggestion that they might carry him up the stairs). In those circumstances, his arrest constituted a due process violation that was independent of any right Lane had to appear personally at *later* proceedings. The lower-court judge held a subsequent preliminary hearing in the accessible law library. In later proceedings, a trial-level judge offered to hold the trial in the same library or in an accessible courthouse in a different county (although he made this offer at a hearing that was inaccessible to Lane), but neither option fully preserved Lane's constitutional rights: The library was not generally accessible to the public, thereby impinging on Lane's right to public proceedings, see *Waller*, 467 U.S. at 46-48; and a change of venue would have been burdensome and denied Lane's state constitutional right to trial in the county in which he was charged. As to Jones, *amici* urge the lack of any constitutional right to obtain courthouse access for the specific purpose of plying one's trade. Ala. Br. 13-14. But whether or not such a specific right exists, Jones was denied her more general right as a member of the public to attend court proceedings.

2. Title II also includes a number of limitations that permit flexibility and cushion the burden on states. Contrary to *amici*'s suggestion, the program accessibility requirement can be satisfied—like the constitutional requirements *amici* discusses—by "provid[ing] alternative means by which [disabled] citizens can attend legal proceedings." Ala. Br. 15-16. The relevant regulations offer an array of means states can take, short of physical alterations to their facilities, to comply with the statute. See 28 C.F.R. § 35.150(b).[16] These alternatives to physical alteration specifically include such relatively simple actions as "reassignment of services to accessible buildings," "delivery of services at alternate accessible sites," the use of aides to provide services to individuals who cannot obtain physical access to the places where those services are offered, and "any other methods that result in making [the state's] services, programs, or activities readily accessible to and usable by individuals with disabilities." *Id.* § 35.150(b)(1). In no event is a state required to make any change—to physical structures or otherwise—that would effect a fundamental alteration, impose an undue burden, or threaten historic preservation interests. See 28 C.F.R. § 35.150(a)(2) & (3).

Where, as here, existing facilities were insufficient to provide access at the time Title II became effective, the ADA's imposition of its program accessibility requirement did effectively compel states to make structural changes to their facilities. But even in such circumstances, the law offered states a fair amount of leeway. Not only could states invoke the fundamental alteration and undue burden defenses, see *id.* § 35.150(a)(2); they also enjoyed a substantial grace

---

[16] Title II imposes a strict requirement of accessibility only on facilities that were the subject of new construction after the ADA's effective date. See 28 C.F.R. § 35.151(a). That requirement, too, is proportional given the minimal costs involved in incorporating accessibility features in new construction. See 1 Leg. Hist., *supra*, at 187 (Senate comm. report).

period of three years from the statute's effective date (four and a half years from the statute's enactment) in which to make the required modifications. See *id.* § 35.150(c). Title II's requirement that court systems be accessible thus targets precisely the sort of conduct that is likely to violate constitutional rights, while carefully limiting the scope of any intrusion on state prerogatives.

3. The state and its *amici* suggest that Congress must do more than show that the substantive program accessibility requirement satisfies the congruence and proportionality test. In their view, Congress must make an independent showing that the imposition of a damages remedy was congruent and proportional. See Pet. Br. 33-34; Ala. Br. 5-6, 25-26. *Amici* go so far as to ask this Court to second-guess Congress's policy judgment that damages are an effective way of achieving compliance with Title II's requirements. See Ala. Br. 5, 25 (arguing that "private damages actions to enforce the federal guarantee would more likely undermine than advance the ADA's goals" and are accordingly "not the optimal means" of implementing the statute). The state and its *amici* profoundly misapprehend the law.

The "congruence and proportionality" test is a means of determining whether Congress has exceeded its remedial power and instead sought "to decree the *substance* of the Fourteenth Amendment's restrictions on the States." *City of Boerne*, 521 U.S. at 519-20 (emphasis added). It does not limit Congress's unquestioned power to determine the *remedies* for violation of an otherwise constitutional law. Where the substantive obligations Congress has imposed on the states satisfy the congruence and proportionality test, nothing in Section 5 demands an additional showing to justify a damages remedy to enforce those obligations. Nor does anything in the Eleventh Amendment demand such a showing. This Court's decision in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), makes clear that, so long as Congress has Section 5 power to impose a given substantive rule on the states, the Eleventh Amendment does not limit the power of

Congress to impose any remedy, damages or otherwise, for a violation of that rule. See *id.* at 456 (Eleventh Amendment no obstacle "[w]hen Congress acts pursuant to § 5").

These points hold particularly true where the remedy authorized by Congress consists merely of compensatory damages. Damages are "a traditional form of compensation for invasion of a legally protected interest." *Bivens* v. *Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388, 408 (1971) (Harlan, J., concurring). Indeed, compensatory damages are generally *presumed* to be available when Congress authorizes a right of action without specifying the remedy. See *Barnes* v. *Gorman*, 536 U.S. 181, 189 (2002); *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 66-71 (1992). And for many Title II plaintiffs, any claim for injunctive relief is moot; "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).[17] Having properly adopted a substantive rule of law to enforce the Fourteenth Amendment, Congress was surely entitled to authorize the most basic of damages remedies for violating that rule. That is particularly true here, where prior enactments had failed to achieve the constitutionally demanded access, and Congress could reasonably believe that only damages and not a mere prospective injunctive remedy would provide the necessary incentive for states to comply. See *Owen* v. *City of Independence*, 445 U.S. 622, 651-52 (1980) (noting deterrent function of damages). The State of Tennessee's own conduct in this case—mouthing support for the ADA while at the same time failing even to come up with the required self-evaluation and transition plan as a necessary first step to compliance—provides powerful testimony to the

---

[17] For example, an individual might be excluded from a particular court proceeding that is of great importance to his life but have no interest in ever attending another court proceeding in the future; once the initial proceeding is concluded, that individual may well lack standing to seek purely prospective relief. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

need for a damages remedy in this context. Both Title II's program accessibility requirement and the damages remedy attached to it thus represent proper exercises of Congress's Section 5 authority to enforce disabled citizens' constitutional rights to accessible court proceedings.

II. Title II As A Whole Reasonably Responds To The History And Threat Of Unconstitutional Exclusion Of Citizens With Disabilities From A Wide Range Of State Activities

The courthouse access context offers a particularly important example of the widespread exclusion of people with disabilities from civic life and political participation. But it is far from the only example. As the ADA's statutory findings and the supporting record before Congress demonstrated, people with disabilities have frequently been excluded from the opportunity to participate in an array of state activities. In many of these areas, the exclusion has operated to deny people with disabilities rights secured by constitutional provisions that impose far more than a rational-basis obligation on states. Considered in the aggregate, this widespread exclusion of people with disabilities from state institutions and services has effectively created a second class of citizens who lack the full and equal opportunity to participate in civic life. Title II's general requirements are directly aimed at eliminating that second-class status. Although the Court need look no further than the courthouse access context to decide this case, Title II is proper Section 5 legislation even when considered as a whole.

A. Because Congress Had Power To Mandate Accessible State Court Systems, The Court Need Not Consider Whether Title II May Be Upheld More Broadly

As we showed in Part I of this brief, Congress plainly had Section 5 power to impose on states the Title II requirements at issue in this case—specifically, the requirement that state court systems, viewed in their entirety, be accessible to individuals with disabilities. Like the court

of appeals, this Court need go no further to uphold the statute as applied here. See *Salinas*, 522 U.S. at 60-61 (rejecting defendant's argument that 18 U.S.C. § 666(a)(1)(B) exceeded Congress's spending power because "[w]hatever might be said about § 666(a)(1)(B)'s application in other cases, the application of § 666(a)(1)(B) to Salinas did not extend federal power beyond its proper bounds").[18]

The state suggests that it is not enough that Congress plainly intended and had the Section 5 power to regulate state conduct like that alleged in the complaint. In the state's view, the Court should hold that Title II is incongruent and disproportional because Congress also sought to reach other state conduct, not at issue in this case, that assertedly lies outside of the legislature's Section 5 authority. See Pet. Br. 29-30 (discussing Title II's application to "parking space

---

[18] The court of appeals properly focused on the courthouse access context of this case in affirming the denial of the state's motion to dismiss. Pet. App. 3-5. But by stating that Title II could be upheld only to the extent that it enforced the Due Process Clause, *id.* 3—and suggesting that the district court on remand could consider only due process and not equal protection bases for the statute, *id.* 5—the discussion in the court's opinion was unduly formalistic. As *Hibbs*, 123 S. Ct. at 1982, makes clear, the crucial dividing line for Section 5 purposes is not between due process and equal protection but between state conduct that triggers heightened constitutional obligations and state conduct that implicates ordinary rational-basis scrutiny. We take the court of appeals' references to "due process" and "equal protection" as recognizing that, after *Garrett*, Title II cannot be justified simply as enforcing ordinary protected-class-based equal protection guarantees. But there is no reason to believe that a similar analysis applies to other aspects of equal protection law such as the fundamental rights doctrine, which were not at issue, and therefore not affected by the discussion of equal protection scrutiny, in *Garrett*. Indeed, this Court has noted that in the access-to-courts context "[d]ue process and equal protection principles converge." *M.L.B.*, 519 U.S. at 120 (internal quotation marks omitted).

availability at museums," "concert seating priorities at state performing arts centers," "recreational offerings at state parks," and "configuration of bathroom stalls at highway rest areas"). That analysis misapprehends the governing law.

Under this Court's precedents, a statute should be sustained so long as Congress had the power to reach the particular factual context before the Court. The Court has emphasized that a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987); see also *Hibbs*, 123 S. Ct. at 1986 (Scalia, J., dissenting) (arguing that the *Salerno* "no set of circumstances" test governs states' claims that statutes facially exceed Congress's Section 5 authority). The state's own *amici* agree that principles of "constitutional avoidance and separation of powers" dictate a focus on the courthouse access context of this case. Ala. Br. 10.

Although it has not expressly confronted the issue in any of its post-*Boerne* cases,[19] this Court has previously

[19] None of the post-*Boerne* cases has called on the Court to address the question whether a Section 5 statute may be upheld as applied to a case Congress had the power and intended to reach, even if other applications of the statute would exceed the legislature's enforcement power. The Court came closest to confronting the issue in *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627 (1999). There, the Court supported its conclusion that the Patent Remedy Act lacked congruence and proportionality by noting that the statute did not require a showing of intent to infringe the plaintiff's patent, see *id.* at 645, although the case before the Court involved an allegation of intentional deprivation, see *id.* at 653-54 (Stevens, J., dissenting). The majority opinion did not expressly address Justice Stevens's argument for an as-applied analysis, but it did note that intentional infringement of patents by a state could not violate the Due Process Clause unless "the State provides no remedy, or only inadequate remedies, to injured patent owners" and that "the State of Florida provides remedies to patent owners for alleged infringement on the part of the State." *Florida Prepaid*, 527 U.S. at 642-44 & n.9. Accordingly, there was no plausible argument that Congress had Section 5 power to apply the Patent Remedy Act to the facts of the case before the Court.

applied these principles in resolving the very type of question presented here: Whether Congress had exceeded its authority to enforce the Reconstruction Amendments. The leading example is *United States* v. *Raines*, *supra*. *Raines* involved the Civil Rights Act of 1957, which authorized the United States to bring an injunctive action against "any person" who interfered with protected voting rights. 42 U.S.C. § 1971(c). The federal government had brought such an action against state election officials, who argued that the statute exceeded Congress's authority to enforce the Fifteenth Amendment. The lower court read the statute's "any person" language as "allow[ing] the United States to enjoin purely private action designed to deprive citizens of the right to vote on account of race or color." *Raines*, 362 U.S. at 20. And it concluded that the statute, as so construed, extended beyond Congress's Fifteenth Amendment power because it exceeded that Amendment's limitation to state action. See *id.* This Court reversed: "if the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality." *Id.* at 24-25. Because the complaint alleged conduct Congress clearly had power to reach—race discrimination by state actors—the lower court should "have gone no further and should have upheld the Act as applied in the present action." *Id.* at 26. See also *Griffin*, 403 U.S. at 104, 107 (upholding 42 U.S.C. § 1985(3) on the facts before the Court, even though the statute's terms might extend to private conspiracies that lie beyond Congress's power to regulate, because the Court's inquiry "need go only to

identifying a source of congressional power to reach the private conspiracy alleged by the complaint in this case").

This case is in an identical posture. Congress's authority to enforce the array of Fourteenth Amendment rights threatened by an inaccessible court system plainly constitutes "a source of congressional power to reach the [facts] alleged by the complaint in this case." *Griffin*, 403 U.S. at 104. Whether or not the state's conduct actually violated the constitutional rights of the plaintiffs here,[20] Congress had the prophylactic authority to require that Tennessee make its courthouses accessible. Because "the complaint here called for an application of the statute clearly constitutional under the [Fourteenth] Amendment," that should be the "end to the question of constitutionality." *Raines*, 362 U.S. at 24-25. The Court need not consider whether Congress had power to extend Title II outside of the courthouse access context.

Indeed, as the state's own *amici* suggest, the variety of applications of Title II almost compels such a context-specific inquiry into the Section 5 basis for the statute. Title II applies to an array of "qualitatively different" state activities. Ala. Br. 7. The constitutional predicate for the statute is likely to vary widely across those different activities. Cf. *United States* v. *Nat'l Treasury Employees Union*, 513 U.S. 454, 478 (1995) (*NTEU*) (refusing in First Amendment case brought by lower-level executive branch employees to consider constitutionality of the statutory honoraria ban as it would apply to senior executive branch officials, because such an application would "presen[t] a different constitutional question than the one we decide today"). Application of Title

[20] To the extent that the court of appeals' opinion may be read as suggesting that the as-applied validity of Title II turns on a fact-specific inquiry into whether the plaintiffs' own constitutional rights were violated, see Pet. App. 5, such a suggestion is inconsistent with this Court's recognition of Congress's prophylactic power. See *Hibbs*, 123 S. Ct. at 1983.

II to demand courthouse access, we have shown, implicates an array of rights guaranteed by the Bill of Rights and the Fourteenth Amendment's Equal Protection and Due Process Clauses. As we demonstrate *infra*, the statute's application to areas of state conduct such as voting, unnecessary institutionalization, and the treatment of prisoners with disabilities raises quite distinct sets of constitutional issues.

Not only will the underlying constitutional principles differ in each of these contexts, but the actual substantive obligations imposed by the statute are likely to differ as well. While demands for accessible courthouses and polling places would invoke the "program accessibility" regulation, 28 C.F.R. § 35.150, a demand for accommodation to a prisoner's medical needs would invoke the "reasonable modifications" regulation, *id.* § 35.130(b)(7) (requiring "reasonable modifications in policies, practices, or procedures" except when such modifications "fundamentally alter the nature of the service, program, or activity"), and a demand for freedom from unnecessary institutionalization would invoke the "integration" regulation, *id.* § 35.130(d) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."). A doctrine that sought in one fell swoop to resolve all of the issues raised by these diverse applications would be nonsensical and is not required by this Court's Section 5 precedents—none of which involved a statute that, like Title II, implicated such different statutory and constitutional questions in its different applications.

Where, as here, application of Title II involves a state activity in which the statute permissibly responds to a realistic threat of constitutional violations on a documented record, it should make no difference that *other* applications of the statutory language might extend beyond the sweep of Congress's enforcement power.[21] Because the strong

[21] It is irrelevant that Title II's operative section is a textually unitary provision that applies equally to any "public entity" without

predicate of past and threatened constitutional violations in the courthouse context plainly gave Congress power to reach state action like that alleged in this case, and Congress plainly intended to reach such action, the state may not challenge Title II as it might apply to other conduct not at issue here.

B. Title II Responds To A Widespread Record Of Actual And Threatened Constitutional Violations

---

distinguishing among different public entities. 42 U.S.C. § 12132; cf. *Wessel* v. *Glendening*, 306 F.3d 203, 208 (4th Cir. 2002) (concluding that "absent judicial redrafting of the statute, there is no narrower constitutional question to address" than the Section 5 basis for Title II as a whole). Contrary to the Fourth Circuit's analysis in *Wessel*, "this Court has on several occasions declared a statute invalid as to a particular application without striking the entire provision that appears to encompass it." *NTEU*, 513 U.S. at 487 (O'Connor, J., concurring in the judgment in part and dissenting in part). For examples of cases other than *Raines*, *supra*, and *Griffin*, *supra*, in which the Court has limited its constitutional analysis to particular applications of undifferentiated statutory language, see *Garrett*, 531 U.S. at 368-69 (limiting Section 5 analysis to ADA Title I's application to state as opposed to local governments, even though Title I by its terms applies equally to all "governments, governmental agencies, [and] political subdivisions," 42 U.S.C. § 2000e(a) (incorporated by reference in 42 U.S.C. § 12111(2), (5), (7))); *id.* at 360 n.1 (holding ADA's abrogation provision unconstitutional only as it applied to Title I, even though that provision appears in a single section of the statute, 42 U.S.C. § 12202, that applies to all titles of the ADA in an undifferentiated manner); *Salinas*, 522 U.S. at 60-61 (upholding 18 U.S.C. § 666(a)(1)(B) at least as applied to cases in which bribes threaten "the integrity and proper operation of the federal program," although the statutory text contained no such limitation); *NTEU*, 513 U.S. at 477-78 (holding statutory honoraria ban invalid only as applied to "Executive Branch employees below grade GS-16," although the relevant statute applied in an undifferentiated manner to any "Member, officer, or employee" of the federal government).

Should the Court go further and consider Title II as a whole, it should conclude that the statute is proper Section 5 legislation. ADA Title II is fundamentally unlike the statute's Title I—which the *Garrett* Court held not to validly abrogate state sovereign immunity. Title I adopted a general rule of nondiscrimination in employment, based almost entirely on evidence of discrimination in the *private* sector. Because the Constitution prohibits employment discrimination against people with disabilities only when that discrimination takes the form of irrational state action, and Congress adduced virtually no record of such discrimination in *public sector* employment, the Court held that Congress lacked Section 5 power to apply the statutory nondiscrimination rule to states. See *Garrett*, 531 U.S. at 365-72.

But Title II is specifically directed at governmental conduct, and it is supported by extensive findings of governmental discrimination in such important nonemployment areas as "education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3). As this Court noted in *Garrett*, the "overwhelming majority" of incidents of potentially unconstitutional state conduct discussed in the ADA's legislative history involved not employment discrimination but the discrimination in public services that is addressed by Title II of the statute. *Garrett*, 531 U.S. at 371 n.7.[22] In many areas of state government, the uniquely governmental discrimination attacked by Title II threatens constitutional rights secured by doctrines that impose far more than rational

---

[22] The Court suggested that the record of state constitutional violations might also have related to matters covered by Title III, the ADA's public accommodations title. See *Garrett*, 531 U.S. at 371 n.7. But Title III by its terms covers only "private entities." 42 U.S.C. § 12181(7). To the extent that states violate the constitutional rights of individuals with disabilities outside of the employment context, it is Title II that addresses those violations.

basis scrutiny on states. Unlike in the employment context, there is often "confirming judicial documentation" of the pattern of unconstitutionality in the areas covered by Title II, in the form of "extensive litigation and discussion of the constitutional violations" in judicial opinions. *Id.* at 376 (Kennedy, J., concurring); see generally Br. for the United States, *Med. Br. of California* v. *Hason*, No. 02-479, at 1a-8a (listing more than 60 "[c]ases [e]videncing [u]nconstitutional [t]reatment of [i]ndividuals with [d]isabilities"). That extensive record of state discrimination fully justifies Title II as remedial and prophylactic legislation. See *Hibbs*, 123 S. Ct. at 1981-83.

But the constitutional problem addressed by Title II goes beyond even the discrete categories of state action that in and of themselves implicate heightened constitutional obligations. The exclusion of a specific class of persons from a wide range of state activities creates a constitutional harm that is greater than the sum of its individual parts. The statutory findings state that people with disabilities have experienced discrimination in an array of government activities, 42 U.S.C. § 12101(a)(3)—discrimination that has "relegated people with disabilities to a position of political powerlessness in our society," *id.* § 12101(a)(7). Although not all of the state practices that exclude people with disabilities from specific public services trigger heightened scrutiny, the aggregate impact of that exclusion raises independent constitutional concerns, for it imposes "general hardships" on "a certain class of citizens." *Romer*, 517 U.S. at 633. As such, it effectively relegates people with disabilities to a second class of citizenship—a result that is abhorrent to the Fourteenth Amendment. See *id.* at 623; *Saenz*, 526 U.S. at 506-07.

The number of specific contexts in which the conduct addressed by Title II implicates heightened constitutional scrutiny is nonetheless significant. States' denial of disabled citizens' core rights of democratic participation, for example, has extended far beyond the problem of inaccessible

courthouses. As the statutory findings explicitly noted, see 42 U.S.C. § 12101(a)(3), states have frequently denied individuals with disabilities their fundamental right to vote. See *Reynolds*, 377 U.S. at 561-62 (stating that the right to vote "is a fundamental matter in a free and democratic society" because it is "preservative of other basic civil and political rights"). For people with mental disabilities and others, the problem has been outright exclusion. States have frequently disenfranchised classes of people with disabilities categorically, without engaging in the individualized determination of competence the Constitution requires.[23]

For people with physical disabilities, the denial of the right to vote has more frequently resulted from the denial of a *place* to vote. Just as a voter's wealth "is not germane to one's ability to participate intelligently in the electoral process," *Harper* v. *Bd. of Elections*, 383 U.S. 663, 668 (1966), so too is a voter's ability to climb stairs or overcome other physical obstacles irrelevant to legitimate voting qualifications. Yet, as Congress was well aware when it enacted the ADA, inaccessible polling places remained a

---

[23] See *Doe* v. *Rowe*, 156 F. Supp. 2d 35, 51-56 (D. Me. 2001) (state constitutional provision disenfranchising persons under guardianship by reason of mental illness violates Fourteenth Amendment because not narrowly tailored to incompetent voters); *Manhattan State Citizens' Group, Inc.* v. *Bass*, 524 F. Supp. 1270, 1274-75 (S.D.N.Y. 1981) (state statute disenfranchising, *inter alia*, people involuntarily committed to hospitals or mental institutions violates Fourteenth Amendment as applied to those who had not been adjudged incompetent); see also *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 464 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) ("As of 1979, most States still categorically disqualified 'idiots' from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials."); 2 Leg. Hist., supra, at 1220 (Nancy Husted-Jensen) ("[P]eople with disabilities have been turned away from the polling places after they have been registered to vote because they did not look competent").

widespread problem throughout the Nation. See, *e.g.*, 1 Leg. Hist., *supra*, at 110 (Senate committee report); 2 *id.* at 1767 (Rick Edwards); 3 *id.* at 1984 (Laura Cooper); 3 *id.* at 2068 (Stephen Fawcett and Barbara Bradford); May 1989 Hearings, *supra*, at 663 (Mary Lynn Fletcher); 135 CONG. REC. S10793 (1989) (Sen. Biden).[24]

Although removing physical barriers to polling place access might cost money, that fact does not diminish the unconstitutionality of denying a wide class of people with disabilities an effective franchise because they have no place to vote. Poll taxes, for example, may be a source of revenue that finances elections, see *Harper*, 383 U.S. at 674 (Black, J., dissenting), but states may not condition the franchise on the payment of those taxes, for the ability to pay one's way is irrelevant to legitimate voting qualifications. See *Harper*, 383 U.S. at 668. Cf. *Bullock* v. *Carter*, 405 U.S. 134, 147-48 (1972) (though candidate filing fees "serve to relieve the State treasury of the cost of conducting the primary elections," candidates may not be excluded on the basis of inability to pay such a fee, because "legitimate costs of the democratic process" should be borne by "the taxpayers generally"). To deny an individual with a disability the opportunity to vote because of the cost of retrofitting polling places built in an inaccessible manner similarly "introduce[s] a capricious or irrelevant factor" into the democratic process. *Harper*, 383 U.S. at 668. Yet that is precisely what states were doing throughout the Nation at the time the ADA was enacted.

---

[24] Congress was also aware that the opportunity to cast an absentee ballot was no solution to this problem. Because absentee ballots typically must be cast well in advance of election day, an absentee option does nothing for the individual who discovers for the first time when he goes to vote that his polling place is inaccessible. It also requires an individual with a disability to cast a ballot before the candidates have had a full opportunity to make their case to the voters. See 1 Leg. Hist., *supra*, at 110 (Senate committee report).

In addition to being denied the right to vote, many people with disabilities have also been denied the opportunity "to seek aid from the government," *Romer*, 517 U.S. at 633, because they have been unable to obtain access to government buildings and offices. See U.S. Comm'n on Civil Rights, *supra*, at 39 (76% of state buildings inaccessible). The ADA's legislative history contains numerous examples of individuals who could not attend important government proceedings, file claims in government offices, or meet with their elected representatives due to the inaccessibility of state facilities. See May 1989 Hearings, *supra*, at 488 (Neil Hartigan); *id.* at 663 (Mary Lynn Fletcher). This broad denial of access to a large class of citizens with disabilities threatens both the right to equal protection of the laws articulated in *Romer* and the First Amendment right to "to petition the Government for redress of grievances." 517 U.S. at 633-34.

People with disabilities have also frequently been denied important educational opportunities. "[E]ducation has a fundamental role in the fabric of our society," and "denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." *Plyler* v. *Doe*, 457 U.S. 202, 221-22 (1982). To be sure, education is not a "fundamental right" such that a state must "justify by compelling necessity every variation in the manner in which education is provided to its population." *Id.* at 223 (citing *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 28-39 (1973)). But when outright exclusion from educational opportunities "imposes a lifetime hardship on a discrete class of children not accountable for that disabling status," *id.*, it is judged against a heightened constitutional standard. See *id.* at 224 (such exclusion "can hardly be considered rational unless it furthers some substantial"—and not merely legitimate—"goal of the State").

Title II responded to precisely that sort of exclusion. Congress expressly found that before the enactment of the

Education for All Handicapped Children Act (EAHCA) in 1975, "1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system." 20 U.S.C. § 1400(c)(2)(C). Yet the EAHCA did not solve the problem. In 1983, the Civil Rights Commission concluded that "[a]lmost a decade after the enactment of this law, a great many handicapped children continue to be excluded from the public schools." U.S. Comm'n on Civil Rights, *supra*, at 28. And a House committee report on the ADA, quoting then-President Bush, reaffirmed that, 15 years after enactment of the EAHCA, people with disabilities remained "the poorest, least educated, and largest minority in America." 1 Leg. Hist., *supra*, at 107.

People with disabilities have also frequently been denied another set of fundamental rights protected by the Equal Protection and Due Process Clauses—the rights to marry and to have and raise children.[25] Beginning in the eugenics era, many states engaged in a widespread practice of sterilizing individuals with disabilities. See U.S. Comm'n on Civil Rights, *supra*, at 36-37. That practice, "although steadily dwindling," was far from a thing of the past at the time the ADA was adopted. *Id.* at 37. The Civil Rights Commission found that "involuntary sterilizations of

[25] See, *e.g.*, *Troxel* v. *Granville*, 530 U.S. 57, 66 (2000) (plurality opinion of O'Connor, J.) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); *id.* at 77 (Souter, J., concurring in the judgment) (endorsing that principle); *Zablocki* v. *Redhail*, 434 U.S. 374, 383 (1978) (restrictions on right to marry subject to heightened scrutiny under Equal Protection Clause); *Stanley* v. *Illinois*, 405 U.S. 645, 649 (1972) (Due Process and Equal Protection Clauses require individualized determination of parental unfitness before depriving unwed father of custody of his children); *Skinner* v. *Oklahoma*, 316 U.S. 535, 541-42 (1942) (state sterilization statute for habitual criminals triggers, and fails, "strict scrutiny" under Equal Protection Clause).

handicapped persons, both pursuant to State statutes and in the absence of statutory authority, continue to be performed." In 1983, 15 states still had statutes authorizing compulsory sterilization of people with mental disabilities and 4 states still had statutes authorizing compulsory sterilization of people with epilepsy. *Id.* Of no less constitutional importance, the Commission found that "[m]any States restrict the rights of physically and mentally handicapped people to marry," and that people with disabilities have "had custody of their children challenged in proceedings to terminate parental rights and in proceedings growing out of divorce." *Id.* at 40 (footnotes omitted). And Congress heard testimony that "child-custody suits almost always have ended with custody being awarded to the non-disabled parent." 2 Leg. Hist., *supra*, at 1611 n.10 (Arlene Mayerson).

Yet another significant way in which states have long denied people with disabilities the full rights of citizenship is by the practice of unnecessary institutionalization. See *Olmstead*, 527 U.S. at 600. Unnecessary institutionalization threatens the due process right to freedom from unnecessary restraint, see *Youngberg* v. *Romeo*, 457 U.S. 307, 324 (1982), and was a widespread problem at the time Title II was enacted. The ADA's statutory findings state that segregation of individuals with disabilities is "a serious and pervasive social problem" and that discrimination "persists in such critical areas as . . . institutionalization." 42 U.S.C. § 12101(a)(2), (3). Supporting those findings, the Civil Rights Commission's report described "the systematic placement of handicapped people in substandard residential facilities"; noted the evolving professional consensus that "most training, treatment, and habilitation services can be better provided to handicapped people in small, community-based facilities"; yet concluded that "a great many handicapped persons remain in segregative facilities." U.S. Comm'n on Civil Rights, *supra*, at 32-35.

Finally, the record before Congress demonstrated that people with disabilities had frequently been denied rights

guaranteed by the Fourth, Fifth, and Eighth Amendments in dealings with law enforcement. The House Judiciary Report on the ADA observed that "persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed" and often "deprived of medications while in jail." 1 Leg. Hist., *supra*, at 490. The legislative history also contains examples of people abused by police officers because of their disabilities. See, *e.g.*, 2 *id.* at 1196-1197 (Cynthia Miller). And a large body of case law found violations of disabled prisoners' Eighth Amendment right to accommodation of their medical needs.[26]

C. Title II Is A Proportional Response To This Widespread Pattern Of Unconstitutional Exclusion

Given the extent of unconstitutional exclusion of people with disabilities from important civic and governmental activities, Title II's requirements are clearly "responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532. Just as in *Hibbs*, 123 S. Ct. at 1981-82, Congress responded to discriminatory state practices that trigger heightened constitutional scrutiny. And Congress has done so in a measured way, by prohibiting

---

[26] See, *e.g.*, *Weeks* v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) (denial of wheelchair to inmate with paralysis, resulting in inmate's inability to shower himself or leave his cell, violated Eighth Amendment); *Beckford* v. *Irvin*, 49 F. Supp. 2d 170, 180 (W.D.N.Y. 1999) (Eighth Amendment violation existed where plaintiff "was regularly deprived use of his wheelchair for extended periods of time, plaintiff was unable to shower, and . . . he was not allowed to use a cup in order to try to bathe by taking water out of his cell toilet or drinking fountain"); *Clarkson* v. *Coughlin*, 898 F. Supp. 1019, 1043 (S.D.N.Y. 1995) (denial of interpretive services and assistive devices to deaf inmates during medical treatment violated Eighth Amendment where "communication between the patient and medical personnel [was] essential to the treatment in question"); *Casey* v. *Lewis*, 834 F. Supp. 1569, 1582 (D. Ariz. 1993) (failure to provide accessible bathrooms, showers, and cells violated Eighth Amendment).

discrimination only when it is targeted at "*qualified* individual[s] with a disability," 42 U.S.C. § 12132 (emphasis added), and by requiring modifications of existing practices only when those modifications are "reasonable," *id.* § 12131, and would not "fundamentally alter" the state's programs, 28 C.F.R. § 35.130(b)(7).

In many contexts addressed by Title II, the statute's coverage overlaps substantially with the requirements of the Constitution. In those cases in which the statute forbids irrational discrimination, see *City of Cleburne*, 473 U.S., at 450, or discrimination that affects a fundamental right such as the right to vote, Title II goes no further than the Constitution. Even the requirement of reasonable modifications goes no further than does the Constitution in the many areas of state government in which the Constitution itself imposes a requirement of individualized accommodation. See, *e.g.*, *Youngberg*, 457 U.S. at 321, 324 (Due Process Clause requires individualized professional judgment in decisions to restrain individuals with disabilities); *Stanley*, 405 U.S. at 649 (Due Process Clause requires individualized inquiry into parent's fitness); *LaFaut* v. *Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (Powell, J., sitting by designation) (Cruel and Unusual Punishments Clause requires individualized accommodation of prisoner's medical needs); *Doe*, 156 F. Supp. 2d at 51-56 (Equal Protection Clause requires individualized determination of voting competency).

To be sure, not all applications of Title II involve state conduct that in and of itself violates the Constitution. But Congress had ample reason to believe that it was necessary here to "proscribe[] facially constitutional conduct in order to prevent and deter unconstitutional conduct." *Hibbs*, 123 S. Ct. at 1977. As we have shown, the cumulative impact of exclusion from an array of government activities creates an independent constitutional harm of second-class citizenship, even if none of the component parts of that exclusion would, considered in isolation, violate the Constitution. See p. 42, *supra*. Moreover, as the Civil Rights Commission concluded

in its report that spurred the drafting and consideration of the ADA, "[d]iscrimination in some areas tends to foster discrimination in other areas." U.S. Comm'n on Civil Rights, *supra*, at 42. When broad-scale discrimination operates to exclude people with disabilities from a range of important opportunities in the community, that exclusion feeds the societal prejudice and stereotyping that leads to further discrimination. See *id.* at 21-22; see also *Olmstead*, 527 U.S. at 600 (explaining how unnecessary institutionalization feeds societal stereotypes and prejudice in this way). Just as in the medical leave context, Congress had ample reason to believe that these "mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination," *Hibbs*, 123 S. Ct. at 1982, that could not be stopped with piecemeal efforts. Cf. *id.* at 1979 n.5 (evidence of state discrimination in *parenting* leave policies justified prophylactic statute mandating *family caretaking* leave because policies regarding both forms of leave "implicate the same stereotypes").

In its exercise of remedial power "to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future," *United States* v. *Virginia*, 518 U.S. 515, 547 (1996), Congress had authority to attack all of the forms of state discrimination that contributed to that self-fulfilling cycle, even if not all of the targeted acts of discrimination themselves would violate the Constitution. The need for a broad remedy was amply demonstrated by the failure of numerous earlier enactments, see *Garrett*, 531 U.S. at 390-91 (Breyer, J., dissenting) (listing pre-ADA disability discrimination laws), to stanch the widespread violations of disabled citizens' constitutional rights. See *Hibbs*, 123 S. Ct. at 1982 (failure of prior legislation justifies "added prophylactic measures"). Title II, considered as a whole, is clearly a proportional response to that "difficult and intractable problem." *Id.* (internal alterations omitted).

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

Samuel R. Bagenstos
1545 Massachusetts Ave.
Cambridge, MA 02138

Thomas C. Goldstein
Goldstein & Howe, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

William J. Brown
(Counsel of Record)
William J. Brown & Assocs.
23 North Ocoee St.
Cleveland, TN 37364
(423)476-4515

November 12, 2003

APPENDIX

Appendix

Courthouse Access Enforcement by the Department of Justice

(source: *http://www.usdoj.gov/crt/ada/enforce.htm*)

Alabama

- *Physical accessibility, Robertsdale Municipal Court (Oct. 31, 2001, Settlement:* http://www.usdoj.gov/crt/ada/roberal.htm*)*
- *Physical accessibility, Georgiana Magistrate's Court (Formal Settlement, April-June 1999 Status Report)*

Arizona

- Physical accessibility, Flagstaff Municipal Court (June 25, 2002, Settlement: *http://www.usdoj.gov/crt/ada/flagstaf.htm*)
- Physical accessibility, unidentified county court house (Informal Settlement, April-June 2002 Status Report)
- Communications accessibility, unidentified state court (Informal Settlement, Oct.-Dec. 1997 Status Report)

Arkansas

- Services on inaccessible third floor, unidentified county court house (Mediation, Oct.-Dec. 2001 Status Report)
- Physical accessibility, Chicot County Courthouse (Formal Settlement, Jan.-March 1998 Status Report)

- Inaccessible site, Van Buren County Courthouse (Formal Settlement, April 1994 Status Report)
- Physical accessibility, Scott County Courthouse (Formal Settlement, April 1994 Status Report)

California

- Physical accessibility, unidentified county court (Informal Settlement, July-Sept. 2001 Status Report)
- Physical accessibility, Mendocino County Courthouse (Formal Settlement, July-Sept. 1998 Status Report)
- Communications accessibility, unidentified county court (Informal Settlement, April-June 1997 Status Report)
- Communications accessibility, Santa Clara County Superior Court (Formal Settlement, Oct.-Dec. 1996 Status Report)
- Communications accessibility, unidentified Municipal Court (Informal Settlement, July-Sept. 1996 Status Report)

Colorado

- Physical accessibility, Saguache County Courthouse (Formal Settlement, Oct.-Dec. 2001 Status Report)
- Physical accessibility, Boulder County Municipal Courthouse (Oct. 2, 2000, Settlement: *http://www.usdoj.gov/crt/ada/boulderc.htm*)
- Accessible parking, unidentified county court (Informal Settlement, July-Sept. 1999 Status Report)

- Communications accessibility, unidentified judicial district (Informal Settlement, Jan.-March 1997 Status Report)
- Physical accessibility, unidentified county courthouse (Informal Settlement, July-Sept. 1994 Status Report)
- Physical accessibility, unidentified county courthouse (Informal Settlement, Apr.-June 1994 Status Report)

Connecticut

- Physical and communications accessibility in courtroom, Windham, CT (July 19, 2000, Settlement: *http://www.usdoj.gov/crt/ada/windhact.htm*)

Florida

- Physical and communications accessibility, Citrus County Courthouse (Formal Settlement, Apr.-June 1998 Status Report)
- Physical accessibility, unidentified county courthouse (Informal Settlement, July-Sept. 1997 Status Report)
- Communications accessibility, Florida state courts (Formal Settlement, Apr.-June 1996 Status Report)
- Physical accessibility, Madison County Courthouse (Formal Settlement, Apr. 1994 Status Report)
- Communications accessibility, Sixth Judicial District (Formal Settlement, Apr. 1994 Status Report)

Georgia

- Inaccessible restrooms, Chatham County Courthouse (Jan. 30, 2002, Settlement: *http://www.usdoj.gov/crt/ada/savannah.htm*)
- Physical accessibility, Ben Hill County Courthouse (Formal Settlement, Apr.-June 2001 Status Report)

Hawaii

- Communications accessibility, Hawaii state courts (Formal Settlement, Oct.-Dec. 1998 Status Report)

Idaho

- Communications accessibility, Fifth Judicial District (Formal Settlement, Oct.-Dec. 1997 Status Report)

Illinois

- Communications accessibility, unidentified county court (Informal Settlement, Oct.-Dec. 2002 Status Report)
- Physical accessibility, Warren County Courthouse (Nov. 26, 2001, Settlement: *http://www.usdoj.gov/crt/ada/warrenil.htm*)
- Communications accessibility, Nineteenth Judicial Circuit (Formal Settlement, July-Sept. 1999 Status Report)

Indiana

- Physical accessibility, unidentified county court (Informal Settlement, Jan.-Mar. 1998 Status Report)

- Communications accessibility, Boone County Courthouse (Formal Settlement, July-Sept. 1997 Status Report)

Iowa

- Communications accessibility, unidentified district court (Informal Settlement, July-Sept. 2001 Status Report)

Kentucky

- Physical accessibility, Perry County Courthouse (Sept. 25, 2001, Settlement: *http://www.usdoj.gov/crt/ada/perryky.htm*)
- Physical accessibility, unidentified county court (Informal Settlement, July-Sept. 1994 Status Report)
- Physical accessibility, Hickman County Courthouse (Formal Settlement, April 1994 Status Report)

Louisiana

- Communications accessibility, unidentified court (Informal Settlement, July-Sept. 2002 Status Report)
- Physical accessibility, New Orleans civil courts and traffic court buildings (Jan. 30, 2002, Settlement: *http://www.usdoj.gov/crt/ada/newola.htm*)
- Physical accessibility, Beauregard Parish Courthouse (Formal Settlement, July-Sept. 1999 Status Report)
- Communications accessibility, Alexandria City Court (Formal Settlement, April-June 1994 Status Report)

Maryland

- Physical accessibility, Worcester County courthouse (July 28, 2003, Settlement: *http://www.usdoj.gov/crt/ada/worceste.htm*)

Massachusetts

- Physical accessibility, Bristol County courts (New Lawsuits, Jan.-Mar. 2003 Status Report)

Michigan

- Communications accessibility, unidentified district court (Informal Settlement, July-Sept. 1999 Status Report)
- Physical accessibility, unidentified juvenile court (Informal Settlement, Oct.-Dec. 1998 Status Report)
- Physical accessibility, unidentified county court (Informal Settlement, Apr.-June 1998 Status Report)
- Communications accessibility, unidentified court (Informal Settlement, Oct.-Dec. 1997 Status Report)
- Communications accessibility, unidentified court (Mediation, July-Sept. 1997 Status Report)
- Physical accessibility, unidentified county court (Informal Settlement, Apr.-June 1997 Status Report)
- Communications accessibility, unidentified county courts (Informal Settlement, Jan.-Mar. 1997 Status Report)

- Inaccessible restrooms, Genesee County probate court (Formal Settlement, Apr.-June 1994 Status Report)
- Communications accessibility, unidentified district court (Informal Settlement, Apr. 1994 Status Report)

Mississippi

- Physical accessibility, various Madison County courts (July 25, 2003, Settlement: *http://www.usdoj.gov/crt/ada/madison.htm*)
- Communications accessibility, unidentified municipal court (Informal Settlement, Jan.-Mar. 2003 Status Report)
- Physical accessibility, unidentified local courthouse (Mediation, Oct.-Dec. 2002 Status Report)
- Communications accessibility, Gulfport Municipal Court (Formal Settlement, Apr.-Sept. 2000 Status Report)
- Exclusion of deaf jurors, Hancock and Harrison County courts (Formal Settlement, Jan.-Mar. 1997 Status Report)

Missouri

- Physical accessibility, unidentified county courthouse (Mediation, Jan.-Mar. 2003 Status Report)
- Physical accessibility, Springfield Municipal Court (Sept. 19, 2001, Settlement: *http://www.usdoj.gov/crt/ada/sprfldmo.htm*)
- Communications accessibility, City of Fulton Municipal Court (Formal Settlement, Apr.-June 1994 Status Report)

- Physical accessibility, unidentified county courthouse (Informal Settlement, Apr. 1994 Status Report)

Nebraska

- Physical accessibility, unidentified county courthouse (Informal Settlement, Jan.-Mar. 2002 Status Report)
- Physical accessibility, unidentified courthouse (Mediation, Jan.-Mar. 2002 Status Report)

New Jersey

- Physical accessibility, Essex County Courthouse (Formal Settlement, Oct.-Dec. 2002 Status Report)
- Physical accessibility, South Orange Village Police Headquarters and Court (Oct. 2, 2000, Settlement: *http://www.usdoj.gov/crt/ada/soorang.htm*)

New Mexico

- Physical and communications accessibility, Santa Fe Municipal Court (Apr. 23, 2001, Settlement: *http://www.usdoj.gov/crt/ada/santafe.htm*)
- Communications accessibility, Roswell Municipal Court (Formal Settlement, Jan.-Mar. 1997 Status Report)

New York

- Physical accessibility, Columbia County Courthouse (May 19, 2003, Settlement: *http://www.usdoj.gov/crt/ada/columbia.htm*)
- Physical accessibility, unidentified town court (Mediation, Oct.-Dec. 2001 Status Report)

- Physical accessibility, Rome City Court (Formal Settlement, Jan.-Mar. 1997 Status Report)
- Communications accessibility, Lloyd Town Justice Court (Formal Settlement, July-Sept. 1996 Status Report)

North Carolina

- Physical access, unidentified trial court (Litigation: Decisions, Oct. 1995-Mar. 1996 Status Report)

North Dakota

- Physical accessibility, Burleigh County Detention Center and Courthouse (Oct. 16, 2002, Settlement: *http://www.usdoj.gov/crt/ada/bismknd.htm*)
- Physical accessibility, Dickinson Municipal Court (Formal Settlement, Jan.-Mar. 1998 Status Report)

Ohio

- Physical accessibility, Lucas County courthouses (Formal Settlement, Jan.-Mar. 2003 Status Report)
- Communications accessibility, unidentified county probate and juvenile court (Informal Settlement, Jan.-Mar. 2003 Status Report)
- Physical accessibility, Guernsey County courthouse (Formal Settlement, Oct.-Dec. 2002 Status Report)
- Communications accessibility, Mason Municipal Court (Formal Settlement, Oct.-Dec. 2002 Status Report)
- Physical and communications accessibility, Warren municipal justice building (Formal Settlement, Apr.-June 2002 Status Report)

- Physical accessibility, Cambridge Municipal Court (Jan. 11, 2001, Settlement: *http://www.usdoj.gov/crt/ada/cambroh.htm*)
- Physical accessibility, unidentified city court (Informal Settlement, Jan.-Mar. 2001 Status Report)
- Physical accessibility, unidentified municipal court (Informal Settlement, Oct.-Dec. 1998 Status Report)
- Physical accessibility, Wadsworth City Court (Formal Settlement, Apr.-June 1994 Status Report)
- Physical accessibility, Paulding County courtroom (Formal Settlement, June 1994 Status Report)

Oklahoma

- Physical accessibility, Adair County Courthouse (Formal Settlement, Jan.-Mar. 2000 Status Report)
- Physical accessibility, unidentified county court (Informal Settlement, Oct.-Dec. 1999 Status Report)
- Physical accessibility, Oklahoma County Courthouse (Formal Settlement, Apr.-June 1999 Status Report)

Oregon

- Physical and communications accessibility, Ashland Municipal Court (Jan. 11, 2001, Settlement: *http://www.usdoj.gov/crt/ada/ashlndor.htm*)

Pennyslvania

- Physical accessibility, unidentified county court (Informal Settlement, Oct.-Dec. 1999 Status Report)
- Physical accessibility, unidentified city court (Informal Settlement, July-Sept. 1999 Status Report)
- Accommodation of jurors with disabilities, Philadelphia Court of Common Pleas (Formal Settlement, Oct.-Dec. 1997 Status Report)
- Physical accessibility, unidentified county court (Informal Settlement, Jan.-Mar. 1995 Status Report)

South Carolina

- Communications accessibility, unidentified county court (Mediation, July-Sept. 2001 Status Report)
- Communications accessibility, Pickens County Court (Formal Settlement, Oct.-Dec. 1994 Status Report)

South Dakota

- Physical accessibility, Butte County Courthouse (2001 Settlement: *http://www.usdoj.gov/crt/ada/buttesd.htm*)

Tennessee

- Physical and communication accessibility, county courthouse, courthouse annex, and justice center in Loudon County (July 25, 2003, Settlement: *http://www.usdoj.gov/crt/ada/loudon.htm*)

- Communications accessibility, Shelby County Court of General Sessions (Formal Settlement, Apr.-Sept. 2000 Status Report)
- Physical accessibility, unidentified courthouse (Mediation, Jan.-Mar. 2000 Status Report)
- Physical accessibility, Van Buren County Courthouse (Formal Settlement, July-Sept. 1998 Status Report)
- Physical accessibility, Johnson County Courthouse (Formal Settlement, July-Sept. 1998 Status Report)
- Communications accessibility, unidentified county circuit court (Informal Settlement, July-Sept. 1997 Status Report)

Texas

- Physical accessibility, San Antonio Municipal Courthouse (Jan. 30, 2002, Settlement: *http://www.usdoj.gov/crt/ada/sananton.htm*)
- Communications accessibility, unidentified county (Informal Settlement, July-Sept. 2001 Status Report)
- Communications accessibility, Houston courts (Formal Settlement, Jan.-Mar. 2000 Status Report)
- Physical accessibility, unidentified county courthouse (Informal Settlement, Oct.-Dec. 1999 Status Report)
- Communications accessibility, unidentified county court (Informal Settlement, July-Sept. 1999 Status Report)
- Physical accessibility, unidentified courthouse (Mediation, Jan.-Mar. 1999 Status Report)
- Physical accessibility, Harris County court facilities (Formal Settlement, Apr. 1994 Status Report)

Utah

- Communications accessibility, courtroom in Logan City Hall (Aug. 31, 2001, Settlement: *http://www.usdoj.gov/crt/ada/loganut.htm*)
- Communications accessibility and exclusion of deaf jurors, district court in Salt Lake City (Formal Settlement, Apr. 1994 Status Report)

Vermont

- Communications accessibility, Windsor County Superior Court (Formal Settlement, Oct.-Dec. 2002 Status Report)

Virginia

- Physical accessibility, Craig County Courthouse (Jan. 30, 2002, Settlement: *http://www.usdoj.gov/crt/ada/craigco.htm*)

Washington

- Physical accessibility, courtroom portions of Mt. Vernon municipal police/justice complex (July 19, 2000, Settlement: *http://www.usdoj.gov/crt/ada/mtvernwa.htm*)

West Virginia

- Physical accessibility, Summers County Courthouse (July 19, 2000, Settlement: *http://www.usdoj.gov/crt/ada/summerwv.htm*)
- Physical accessibility, McDowell County Courthouse (Formal Settlement, July-Sept. 1998 Status Report)

- Physical accessibility, Wetzel County Courthouse (Formal Settlement, Jan.-Mar. 1998 Status Report)
- Physical accessibility, unidentified county court (Informal Settlement, July-Sept. 1996 Status Report)
- Physical accessibility, Mercer County Courthouse (Formal Settlement, Jan.-Mar. 1995 Status Report)

Wisconsin

- Physical accessibility, Outagamie County Justice Center (Formal Settlement, Apr.-June 1997 Status Report)

Wyoming

- Physical accessibility, unidentified county courthouse (Informal Settlement, Jan.-Mar. 1997 Status Report)

Unidentified States

- Communications accessibility, unidentified court (Informal Settlement, Jan.-Mar. 2003 Status Report)
- Communications accessibility, a "New England State court system" (Informal Settlement, Jan.-Mar. 2002 Status Report)
- Communications accessibility, unidentified county superior court (Informal Settlement, Oct.-Dec. 2001 Status Report)
- Communications accessibility, "a southern state" (Informal Settlement, Jan.-Mar. 1997 Status Report)
- Physical accessibility, courthouses in "various cities and towns in the East and Midwest" (Informal Settlement, Apr. 1994 Status Report)

Supreme Court, U.S.
FILED
DEC 17 2003
OFFICE OF THE CLERK

No. 02-1667

In The Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

GEORGE LANE, BEVERLY JONES, and UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

PAUL G. SUMMERS
Attorney General & Reporter
for the State of Tennessee
MICHAEL E. MOORE*
Solicitor General
**Counsel of Record*
S. ELIZABETH MARTIN
MARY MARTELLE COLLIER
Senior Counsel
OFFICE OF THE ATTORNEY GENERAL
& REPORTER FOR THE STATE
OF TENNESSEE
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-3226

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. TITLE II, AS APPLIED IN THE COURTHOUSE ACCESS CONTEXT, IS NOT VALID SECTION 5 LEGISLATION	2
II. TITLE II, VIEWED IN ITS ENTIRETY, IS NOT VALID SECTION 5 LEGISLATION	11
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

Board of Educ. v. Rowley, 458 U.S. 176 (1982) 15

Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001) .....*passim*

Boddie v. Connecticut, 401 U.S. 371 (1971) 5

Bowers v. National Collegiate Athletic Ass'n, 9 F. Supp. 2d 460 (D.N.J. 1998) 12

Carty v. Farrelly, 957 F. Supp. 727 (D.V.I. 1997).....18

Chaffin v. Kansas State Fair Bd., 348 F.3d 850 (10th Cir. 2003) 12

City of Boerne v. Flores, 521 U.S. 507 (1997) 5, 6, 12, 13

City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).....10, 15, 19

Department of Agric. v. Moreno, 413 U.S. 528 (1973) 14

Eckstein v. Kirby, 452 F. Supp. 1235 (E.D. Ark. 1978).....10

Faretta v. California, 422 U.S. 806 (1975) 5

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999).....6, 12

Heller v. Doe, 509 U.S. 312 (1993) 16, 17

In re Marriage of Carney, 598 P.2d 36 (Cal. 1979) 18

J.E.B. v. Alabama ex rel T.B., 511 U.S. 127 (1994) 10

Keirnan v. Utah Transit Auth., 339 F.3d 1217 (10th Cir. 2003).....12

Key v. Grayson, 172 F.3d 996 (6th Cir. 1999), *cert. denied*, 528 U.S. 1120 (2000) 18

TABLE OF AUTHORITIES – Continued

Page

LaFaut v. Smith, 834 F.2d 389 (4th Cir. 1987).....18

Leach v. Shelby County Sheriff, 891 F.2d 1241 (6th Cir. 1989), *cert. denied*, 495 U.S. 932 (1990) 18

Love v. Westville Corr. Ctr., 103 F.3d 558 (7th Cir. 1996).....18

Minnesota State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271 (1984).....14

Miranda v. Munoz, 770 F.2d 255 (1st Cir. 1985).....18

Moye v. Moye, 627 P.2d 799 (Idaho 1981) 18

Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 123 S. Ct. 1972 (2003).....6, 11

Parker v. Universidad de Puerto Rico, 225 F.3d 1 (1st Cir. 2000).....12

Plyler v. Doe, 457 U.S. 202 (1982).....15

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).....3, 5

Romer v. Evans, 517 U.S. 620 (1996) 14

Schweiker v. Wilson, 450 U.S. 221 (1981).....17

Shepard v. Irving, 77 Fed. Appx. 615 (4th Cir. 2003).....12

Stewart v. Stewart, 521 N.E.2d 956 (Ind. Ct. App. 1988).....18

Thomas v. Nakatani, 309 F.3d 1203 (9th Cir. 2002) 12

Thompson v. Colorado, 278 F.3d 1020 (10th Cir. 2001), *cert. denied*, 535 U.S. 1077 (2002) 12

Waller v. Georgia, 467 U.S. 39 (1984)..... 5

Wroncy v. Oregon Dep't of Transp., 9 Fed. Appx. 604 (9th Cir. 2001) 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. § 12101(a)(1) 13
42 U.S.C. § 12101(a)(3) 6
42 U.S.C. § 12132 19
TENN. CODE ANN. § 22-1-101 (1994 Repl.) 9
TENN. CODE ANN. § 22-1-102(a)(4) (1994 Repl.) 9
TENN. CODE ANN. § 22-1-102(b) (1994 Repl.) 9
TENN. CODE ANN. § 22-1-103(a)(5) (1994 Repl. & 2003 Supp.) 9
TENN. CODE ANN. § 22-1-103(a)(7) (1994 Repl. & 2003 Supp.) 9
TENN. CODE ANN. § 22-1-103(c) (1994 Repl. & 2003 Supp.) 9
TENN. CODE ANN. § 22-2-304(d)(1) (1994 Repl.) 10

MISCELLANEOUS

H.R. REP. NO. 101-485(IV), 101st Cong., 2d Sess. *reprinted in* 1990 U.S.C.C.A.N. 512 6
S. REP. NO. 101-116, 101st Cong., 1st Sess. (1989) 6
OFFICIAL TENNESSEE TRANSPORTATION MAP (2004) D-12 (available at http://www.tdot.tn.us/maps/front.pdf) 4

ARGUMENT

Respondents Lane and Jones assert that the validity of Title II's abrogation of the States' sovereign immunity should be considered on a case-by-case basis and must be sustained "so long as Congress had the power to reach the particular factual context before the Court." Lane Br. 36. Although they nowhere dispute that Title II forbids a vast array of state policies and practices that do not violate the Fourteenth Amendment rights of disabled persons, Lane and Jones contend that Title II is nevertheless proper section 5 enforcement legislation as applied in "the courthouse access context" presented by their case, because Title II operates in that narrow sphere as "a 'reasonably prophylactic' measure" designed to eliminate "[t]he threat to constitutional rights posed by inaccessible courts. . . ." Lane Br. 20, 28 & 34-40. By contrast, the United States attempts to defend the indiscriminate sweep of Title II in its entirety, arguing that a context-specific approach such as that endorsed by the private respondents "is not the model this Court has applied" in prior abrogation cases and is "at odds with this Court's congruence and proportionality test for evaluating Section 5 legislation," which "necessarily entails looking at a statutory provision's overall operation and coverage. . . . " U.S. Br. 39.

In petitioner's view, either mode of analysis leads to the same conclusion. Title II of the Americans with Disabilities Act exceeds Congress' enforcement authority under section 5 of the Fourteenth Amendment.

I. TITLE II, AS APPLIED IN THE COURTHOUSE ACCESS CONTEXT, IS NOT VALID SECTION 5 LEGISLATION.

A. It must be emphasized at the outset that the particular allegations of the Complaint filed in this case do not reveal any violation of the constitutional rights of respondents Lane or Jones.[1] As for respondent Lane, the Complaint acknowledges that he was in fact able to attend his initial appearance in person to hear the criminal charges filed against him, despite the barrier presented by the staircase leading to the second-floor courtroom in the Polk County Courthouse in Benton. Pet. App. 15. He does not claim that court personnel refused him assistance to negotiate the stairs on this occasion. From all that appears on the face of the Complaint, he never requested such assistance or asked that the hearing be relocated to accommodate him.

The Complaint further makes it clear that Lane's subsequent arrest for failure to appear at his next scheduled hearing occurred only after he willfully refused assistance from officers dispatched by the court to help him to the courtroom. Pet. App. 15. Lane suggests for the

[1] The private respondents' brief in this Court discusses at some length allegations made by persons other than Lane and Jones. Lane Br. 6 & 14. These individuals (identified as Ann Marie Zappola, Ralph E. Ramsey, Sr., Dennis Cantrel, and A. Russell Larson) were apparently added to the lawsuit as plaintiffs before the district court while petitioner's appeal of the denial of its motion to dismiss the original complaint was pending. The amended complaint is not part of the record on appeal; these additional plaintiffs were never made parties to the appeal in the Sixth Circuit; and, accordingly, they are not before this Court.

first time in this Court that he was privileged to defy the court's order to appear because he should not have been required to "put his safety at risk by allowing court employees to carry hir[1]" up the stairs to the courtroom. Lane Br. 5. But no such safety concerns are mentioned in the Complaint, and none are otherwise borne out by this record. Moreover, Lane cites no authority for the extraordinary proposition that the Constitution (or Title II, for that matter) excuses disabled persons from the duty to obey the lawful orders of a court when the court itself makes available to them the means to comply.

The Complaint also discloses that the court conducted Lane's preliminary hearing in a fully accessible library located on the first floor of the courthouse in Benton, albeit over Lane's objection. Pet. App. 16. Lane claims in this Court (again, for the first time) that he objected to the use of the library because it was not "generally accessible to the public." Lane Br. 30 n.15. But his Complaint alleges merely that the library was "not *frequented* by the public." Pet. App. 16 (emphasis added). There is a difference. The constitutional command of open judicial proceedings has never been understood to require the States to provide courtrooms that are "frequented by the public." *See generally Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980).

The trial court's order denying Lane's motion to dismiss made at his next hearing, conducted on the second floor of the courthouse in Benton, reveals that the court offered to relocate all further proceedings in the case to the modern, handicap-accessible courthouse in nearby

Ducktown.[2] Lane now for the first time seeks to justify his refusal to accept that offer by claiming that such an accommodation would have required him to forfeit his state constitutional right to be tried "in the county in which he was charged." Lane Br. 30 n.15. However, because Ducktown and Benton are located in the same county – Polk County[3] – the court's offer did not implicate Lane's rights under the Tennessee Constitution.

Finally, the allegations of the Complaint admit that the presiding judge of the judicial district ultimately stayed all proceedings in criminal cases at the Benton courthouse, including in Lane's case, until an elevator could be installed in the building. An elevator was in fact installed in June 1998. Pet. App. 17. Plainly, Lane was not deprived of any constitutional right as a consequence of the architectural barriers at the Benton courthouse.

Neither was respondent Jones. She is a certified court reporter, and she alleges that she requires access to the various courthouses at issue here "for the purpose of supporting herself and her family by being allowed to attend court proceedings and transcribing those proceedings." Pet. App. 13. There is no fundamental right to earn one's living as a court reporter. Thus, to make out an equal

[2] *State v. Lane,* Nos. 97-016, 97-017 (Polk County, Tenn., Criminal Court) (order denying motion to dismiss entered April 15, 1997), *aff'd,* C.C.A. No. 03COA-9704-CR-00158 (Tenn. Sept. 2, 1997). Pursuant to Rule 32 of the Rules of this Court, petitioner has submitted a request to the Clerk to lodge a certified copy of this Order along with other documents in Lane's criminal case on file in the Tennessee Supreme Court. Pet. Br. 8 n.1.

[3] OFFICAL TENNESSEE TRANSPORTATION MAP (2004) D-12 (available at http://www.tdot.state.tn.us/maps/front.pdf).

protection violation under the circumstances alleged in the Complaint, Jones at the very least would be required to plead and prove that the various counties' failure to retrofit their courthouses to accommodate her disability was either wholly irrational or intentionally calculated to stigmatize disabled persons. *But see Board of Trustees of the Univ. of Alabama v. Garrett,* 531 U.S. 356, 368 (2001) ("If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause."). She has made no such allegation in this case, however.

B. To be sure, as observed by respondents and their amici, the courthouse is a venue where a number of fundamental constitutional rights may be exercised and enforced. For example, the Constitution requires that judicial proceedings be open to the public, *Richmond Newspapers, Inc.,* 448 U.S. at 555; *Waller v. Georgia*, 467 U.S. 39 (1984); defendants in criminal cases have a constitutional right to be present at all critical stages of the trial, *Faretta v. California,* 422 U.S. 806 (1975); and civil litigants must be afforded an equal opportunity to present their claims to the courts, *Boddie v. Connecticut,* 401 U.S. 371 (1971). But identifying the set of constitutional rights purportedly protected by section 5 enforcement legislation is only the first step in the analysis. Before invoking its section 5 powers to abrogate state sovereign immunity, Congress must have before it evidence of a "widespread and persisting deprivation of . . . [those] rights" by the States. *City of Boerne v. Flores,* 521 U.S. 507, 525 (1997). The requirement that Congress base section 5 legislation upon a well-documented record of unconstitutional behavior by the States has not been relaxed by this Court in prior cases merely because the set of constitutional interests

implicated by the legislation were deemed to be "fundamental" or otherwise qualified for "heightened" protection by the courts. *See, e.g., City of Boerne,* 521 U.S. at 529 (free exercise rights guaranteed by the First Amendment); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank,* 527 U.S. 627 (1999) (right to be free from state deprivations of property rights without due process); *Nevada Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 123 S. Ct. 1972 (2003) (right to be free from gender-based discrimination unnecessary to the achievement of important governmental objectives).

There was no proof in the record before the Congress that enacted the ADA that the States were engaged in a pattern of violating the constitutional rights of disabled persons at courthouses across the country. Perhaps most tellingly, although that Congress had the benefit of "more than forty years of experience studying the scope and nature of discrimination against persons with disabilities," U.S. Br. 15, the House and Senate Reports on the legislation do not contain even a single reference to problems encountered by disabled persons in gaining meaningful access to the courts. *See generally* H.R. REP. NO. 101-485(IV), 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 512; S. REP. NO. 101-116, 101st Cong., 1st Sess. (1989). Nor does the text of the legislation itself reflect that courthouse access was a matter of concern. The substantive provisions of the ADA do not mention the subject. And, although Congress took the trouble in its formal statement of "Findings and purpose" to identify specific areas in which it believed disability discrimination to be a problem, *e.g.*, in "employment, housing, public accommodations, education, . . . and access to public services," 42 U.S.C. § 12101(a)(3), it did not see fit to include "access to the justice system" or "unconstitutional treatment by the courts" in that list.

The only bit of testimonial evidence concerning courthouse access issues gleaned by respondents from the voluminous legislative record consists of a single story recounted by a witness named Emeka Nwojke. She described the considerable difficulties she experienced overcoming numerous architectural barriers on her way to a court proceeding, only to be treated rudely by court personnel and the judge when she finally arrived. U.S. Br. 21-22. As inexcusable as that incident may have been (and petitioner offers no excuses for it), respondents certainly must concede that Ms. Nwojke's story does not reflect the occurrence of any constitutional violation.[4]

C. Respondents and their amici have likewise failed to make a persuasive case outside the legislative record

---

[4] The unsubstantiated anecdotes contained in the Task Force Report lodged with this Court in *Garrett,* 531 U.S. at 391-424 (Breyer, J., dissenting), do not establish any widespread pattern of unconstitutional behavior by the States in the courthouse context. *See* U.S. Br. 22 n.14. The vast majority of the pertinent entries in the Report merely label one or more court facilities in a particular jurisdiction "inaccessible" but do not document the occurrence of any constitutional violations at those facilities. *See, e.g.,* CA 254 (handwritten statement about "intermittent inaccessibility of County Court" due to faulty elevators); MA 812 (photo and news article of person in wheelchair being carried up steps in order to testify; no indication she was unable to testify). The few such entries that contain any detail whatsoever consist almost entirely of unsworn hearsay accounts and, like Ms. Nwojke's account, do not permit any conclusion that the incident described involved a constitutional violation by a State. *E.g.*, AL 15 (statement from Alabama employee regarding incident at an unidentifed courthouse related by an unnamed caller; no indication that witness involved was unable to testify.)

that the States are guilty of depriving disabled persons of meaningful access to the courts, either now or in the past. They rely principally on the fact that too many courthouses across the country have yet to eliminate architectural barriers which undoubtedly make physical access to courtrooms and clerk's offices more onerous for disabled citizens than for others. But respondents and their amici have presented *no evidence* that such barriers have caused the violation of anyone's constitutional rights. Indeed, in the hundreds of pages of briefs filed in this Court by respondents and their amici, there does not appear a single citation to case law from any jurisdiction in which it appears that a disabled criminal defendant was unconstitutionally excluded from access to a critical stage of his trial by such barriers; or in which a disabled civil litigant was held to have been unconstitutionally denied the right to pursue his claims as the result of such barriers; or in which such barriers were held to have prevented a disabled member of the public from attending judicial proceedings in violation of the Constitution's public trial guarantee.[8] Nor do the Department of Justice's quarterly reports concerning its Title II compliance investigations of courthouse facilities document any such instances. Those reports reveal only that architectural barriers continue to exist at courthouses in many localities. They do not establish that a pattern of constitutional violations has occurred at those facilities. As respondent Lane's experience illustrates

[8] The handful of cases addressing courthouse access issues cited by the private respondents, Lane Br. 24 & n.13, do not contain any findings of constitutional violations by the States but instead address violations of the statutory access requirements imposed by the Rehabilitation Act and Title II of the ADA.

(*supra* pp. 2-4), the presence of such barriers does not inevitably, or even probably, pose any real threat to the constitutional rights of disabled persons.

The evidence offered by respondents that the States unconstitutionally exclude disabled persons from participation in other aspects of the judicial process is also flimsy. Its weakness is typified by the United States' egregious misstatement concerning the rules governing jury service in Tennessee. U.S. Br. 23-24 ("Yet, to this day, petitioner continues to prohibit the 'physically disabled' from serving as jurors."). The fact of the matter is that all citizens over the age of 18 are liable to be summoned to jury service in Tennessee. TENN. CODE ANN. § 22-1-101 (1994 Repl.). Persons "disabled by bodily infirmity," TENN. CODE ANN. § 22-1-103(a)(5) (1994 Repl. & 2003 Supp.), or "not in the full possession of the senses of hearing or seeing," TENN. CODE ANN. § 22-1-103(a)(7) (1994 Repl. & 2003 Supp.), may claim a limited exemption from liability to act as jurors, but it is up to them to claim the exemption. *See* TENN. CODE ANN. § 22-1-103(c) (1994 Repl. & 2003 Supp.). Once summoned, "[p]ersons of unsound mind and habitual drunkards" are excluded from actual service on a jury. TENN. CODE ANN. § 22-1-102(a)(4) (1994 Repl.). But a hearing- or sight-impaired person may be excluded from such service only if the court makes an individualized determination "that such person cannot provide adequate service as a juror on such jury." TENN. CODE ANN. § 22-1-102(b) (1994 Repl.). Thus, the charge that Tennessee's

juror qualification statutes unconstitutionally discriminate against individuals with disabilities is false.[6]

Other proof offered by the United States for the proposition that the States were unconstitutionally excluding the disabled from jury service in 1990 when Congress enacted the ADA consists of a 1948 Oklahoma judicial decision, a Louisiana statute repealed in 1966, and a Florida statute repealed in 1979. U.S. Br. 24 n.16. Obviously, none of these materials can supply an adequate predicate for Title II as applied in this context. Nor can the Arkansas statute, which until 1994 excluded potential jurors whose hearing or sight was "substantially impaired,"[7] or the 1985 Missouri court decision, which approved a similar exclusion. *Id.* This Court has never held that the Constitution requires the States to make special accommodations for prospective jurors who are unable to hear oral testimony or unable to see documentary evidence.[8]

---

[6] The Tennessee statute cited by the United States as authority for its baseless charge permits the county board of jury commissioners to put aside the names of persons drawn from the jury box "known to the board to have died, removed from the county, or become mentally or physically disabled *for jury service.*" TENN. CODE ANN. § 22-2-304(d)(1) (1994 Repl.) (emphasis added). Thus, the statute permits the removal of the names of only those persons "disabled for jury service," not, as the United States would have it, the names of all persons with disabilities.

[7] The constitutionality of the Arkansas statute in question was upheld in *Eckstein v. Kirby*, 452 F. Supp. 1235 (E.D. Ark. 1978).

[8] To the contrary, "[p]arties may ... exercise their peremptory challenges to remove from the venire any group ... normally subject to 'rational basis' review." *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 143 (1994) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985)).

D. Given the dearth of evidence that the States have been involved in any pattern of unconstitutional discrimination against the disabled in the administration of their justice systems, this Court's decision in *Hibbs* lends no support to the private respondents' claim that Title II, as applied in that discrete context, may be defended as appropriately congruent and proportional section 5 prophylaxis. The Family and Medical Leave Act sustained in *Hibbs* was enacted against the backdrop of a "long and extensive history of sex discrimination" by the States in the workplace, *Hibbs,* 123 S. Ct. at 1979, and was supported by a detailed factual "record of [their] unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits." *Id.* at 1981. Here, by contrast, the threat to fundamental constitutional rights conjured up by the private respondents in the courthouse context is entirely hypothetical. While it may be "easier for Congress to show a pattern of state constitutional violations" when the target is state action that "triggers a heightened level of scrutiny," *id.* at 1982, *Hibbs* makes clear that a pattern of misconduct must nevertheless be demonstrated. *Hibbs* does not suggest that Congress may invoke its section 5 authority to stamp out the threat of constitutional violations it has no reason to believe are occurring.

II. TITLE II, VIEWED IN ITS ENTIRETY, IS NOT VALID SECTION 5 LEGISLATION.

A. For the most part the United States does not address petitioner's central contention – that Title II, considered in its entirety, fails the congruence and proportionality test of valid section 5 legislation because its sheer breadth "is so out of proportion to ... [its] supposed

remedial or preventive object," *City of Boerne*, 521 U.S. at 532, that it can only be viewed as an attempt by "Congress to rewrite the Fourteenth Amendment law laid down by this Court in *Cleburne*." *Garrett*, 531 U.S. at 374. Although section 5 mandates that Congress "must tailor its legislative scheme to remedying or preventing" a documented pattern of state "conduct transgressing the Fourteenth Amendment's substantive provisions," *Florida Prepaid*, 527 U.S. at 639, the case law under Title II since its enactment confirms beyond dispute that most of the conduct regulated by the statute does not even remotely implicate the constitutional rights of disabled persons.[9]

B. Ignoring the virtually limitless variety of contexts in which the States are forced into federal court by Title II

[9] *See, e.g.*, *Chaffin v. Kansas State Fair Bd.*, 348 F.3d 850 (10th Cir. 2003) (failure to provide meaningful access for disabled persons to attend concert at the state fair); *Shepard v. Irving*, 77 Fed. Appx. 615 (4th Cir. 2003) (disabled student seeks expungement of "F" grade and of plagiarism conviction); *Keirnan v. Utah Transit Auth.*, 339 F.3d 1217 (10th Cir. 2003) (disabled bus rider sues state transit authority for failure to accommodate wheelchair that exceeded size and weight of common wheelchair); *Thomas v. Nakatani*, 309 F.3d 1203 (9th Cir. 2002) (deaf traveler sues Hawaii for quarantining guide dog upon entry into state); *Wroncy v. Oregon Dep't of Transp.*, 9 Fed. Appx. 604 (9th Cir. 2001) (plaintiff disabled by extreme sensitivity to herbicides sues on account of state's refusal to stop spraying weed killer along public roads near her home); *Thompson v. Colorado*, 278 F.3d 1020 (10th Cir. 2001) (state prohibited by Title II from charging fee for handicapped parking placards), *cert. denied*, 535 U.S. 1077 (2002); *Parker v. Universidad de Puerto Rico*, 225 F.3d 1 (1st Cir. 2000) (disabled plaintiff sues public university for defects in wheelchair path resulting in unsafe access to campus gardens); *Bowers v. National Collegiate Athletic Ass'n*, 9 F. Supp. 2d 460 (D.N.J. 1998) (learning-disabled student claims Title II violation by public university which declared him academically ineligible to play college football).

to defend entirely constitutional behavior, the United States chooses instead to highlight Title II's coverage in a few areas where it is claimed that Congress sufficiently identified a pattern of "state conduct [that] interferes with or threatens the fundamental rights of individuals with disabilities." U.S. Br. 36. An objective assessment of the legislative record belies that claim, however.

Deliberate persecution of disabled persons. Practices of the distant past long since abandoned – the eugenics movement, compulsory sterilization, "ugly laws," the total exclusion of handicapped children from public education, and the "torture, imprisonment and execution of handicapped people," U.S. Br. 18-19 – do not supply an adequate predicate for the enactment of Title II for the same reason they were rejected by this Court in *Garrett* as a justification for Title I of the statute: "[T]here is no indication that any State had persisted in . . . such harsh measures as of 1990 when the ADA was adopted." *Garrett*, 531 U.S. at 369 n.6. *See also City of Boerne*, 521 U.S. at 530 ("RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.").

Access to the courts and participation in the justice system. As petitioner has demonstrated, *supra* at pp. 5-10, the evidence before Congress was plainly insufficient to demonstrate any state-sponsored pattern of unconstitutional abuse in these areas.

Voting. At the time of the passage of the ADA, there were some 43 million disabled Americans. 42 U.S.C. § 12101(a)(1). But, to establish that the States were engaged in a pattern of unconstitutional discrimination against the handicapped in voting, the United States culls

from the legislative record anecdotes from a grand total of three disabled voters who had experienced difficulties at the polls. U.S. Br. 27-28 & n.19. The United States notes that Congress also heard about disabled voters who exercised the franchise by casting absentee ballots rather than going to the polls. U.S. Br. 28. Obviously, such voters have not suffered any unconstitutional abridgement of their right to vote.

Access to government officials and proceedings. The lack of ramps, elevators and handicap-accessible seating at some state buildings – making attendance at public meetings and conferences with public officials more difficult for the disabled than for others – is by no means desirable, but neither has it ever been regarded as unconstitutional. *Cf. Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 284 (1984) ("Policymaking organs in our system of government have never operated under a constitutional constraint requiring them to afford every interested member of the public an opportunity to present testimony before any policy is adopted."). Contrary to the government's suggestion, U.S. Br. 29, there is no viable analogy to be drawn between the existence of such barriers, on the one hand, and laws enacted out of a "bare . . . desire to harm a politically unpopular group. . . ," on the other. *Romer v. Evans*, 517 U.S. 620, 634 (1996) (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). The design of public buildings is hostage to a number of constraints: budgetary limitations, site restrictions, security demands, aesthetic considerations, and the state of the engineering and architectural arts at the time of construction. The fact that one or more of these factors may combine to produce a structure ill-suited to the special needs of the disabled cannot logically support an

inference of discriminatory animus against such persons, any more than can the decision by L'Enfant to locate the Capitol atop Jenkins Hill.

Education. "Public education is not a 'right' granted to individuals by the Constitution." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). Accordingly, mental or physical disability is a "characteristic that the government may legitimately take into account" in shaping education policy so long as the choices made are rational. *Cleburne,* 473 U.S. at 446. In the field of education, the Court has applied heightened scrutiny only to laws that inflict a "punitive discrimination based on status," *Plyler*, 457 U.S. at 240 (Powell, J., concurring), so as to "deny to a discrete group of innocent children the free public education . . . offer[ed] to other children. . . ." *Id.* at 230. When it enacted the ADA, Congress lacked any evidence that state education officials were currently pursuing such policies targeted at handicapped children. Indeed, by that time, the federal Education for All Handicapped Children Act of 1975 had been on the books for more than a decade; at least 49 States were receiving federal financial assistance under the Act, *Board of Educ. v. Rowley*, 458 U.S. 176, 183-84 (1982); and, as a condition of receiving such assistance, each one of those States had been required to demonstrate to the satisfaction of the Secretary of Education that it "ha[d] in effect a policy that assures all handicapped children the right to a free appropriate public education." *Id.* at 181 (quoting 20 U.S.C. § 1412(1)). In its effort to cobble together from the legislative record evidence of a pattern of state-sanctioned unconstitutional discrimination in education, the United States can point to only a dozen instances of mistreatment of handicapped children in all of the nation's elementary and secondary schools, each one committed by an employee of a

local school district.[10] U.S. Br. 25-26 & n.17. The number of cited instances involving such mistreatment in state institutions of higher learning is smaller still. U.S. Br. 26 & n.18. Plainly, all of "these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based." *Garrett*, 531 U.S. at 370.

Public transportation. The Fourteenth Amendment has never been construed to confer a substantive constitutional right to public transportation. Thus, the States' activities in this field, insofar as they involve classifications based upon disability, are subject to rational basis scrutiny and are entitled to a "strong presumption of validity." *Heller v. Doe,* 509 U.S. 312, 319 (1993). Aside from a single anecdote concerning rude bus drivers in one American city and a quotation from an insensitive Connecticut transportation official, U.S. Br. 33-34, the United States offers no evidence whatsoever that Congress had reason to believe States were irrationally or invidiously discriminating against individuals with disabilities in public transportation. Without doubt, budgetary constraints have forced some transport authorities to defer purchases of new equipment designed to accommodate the

[10] The United States asserts that the Court is "not constrained, as it was in *Garrett,* to consider only the . . . evidence of unconstitutional conduct directly by the States" "because the line between state and local government is harder to discern in the context of public services than it is in employment." U.S. Br. 12. But the United States fails to identify any public service context in which this is true. Moreover, as the Court observed in *Garrett*, "[i]t would make no sense to consider constitutional violations . . . [by local governments], as well as by the States themselves, when only the States are the beneficiaries of the Eleventh Amendment." 531 U.S. at 369.

needs of disabled persons. But decisions based on such considerations are not irrational, *see Schweiker v. Wilson,* 450 U.S. 221, 238-39 (1981), and "the States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational." *Garrett,* 531 U.S. at 367.

Licensing decisions. In this area too, state decisionmaking is presumptively constitutional; one who charges that a particular licensing determination irrationally discriminates against the disabled must "negative every conceivable basis which might support it." *Heller,* 509 U.S. at 320. The United States fails to carry that burden with respect to the sole incident discussed in the House Report on the ADA concerning discriminatory treatment in licensing. U.S. Br. 33 (denial of teaching credential to applicant stricken with polio). Similarly, the references to licensing decisions in the Task Force Report contain insufficient detail to permit any conclusion with respect to their constitutionality. U.S. Br. 33 n.26.

Zoning decisions. There was no evidence before Congress that the States were guilty of unconstitutional disability discrimination in zoning decisions at the time of the enactment of the ADA. All of the examples cited by the United States from the Task Force Report on this topic involve decisions by local government zoning agencies; none of those examples indicates that the decision involved was directed by a State or was required to implement state policy. U.S. Br. 33 & n.25.

Child custody. While Congress heard unsubstantiated allegations of discrimination against the disabled in child custody cases from two witnesses, U.S. Br. 31 & n.23, the

judicial decisions cited by the United States to buttress those charges actually undercut them. None of the cited decisions contains a finding of unconstitutional discrimination; all of them exemplify the readiness of state appellate courts to safeguard the rights of disabled persons in family law matters.[11]

Law enforcement / treatment of prisoners. All but one of the examples of police misconduct cited by the United States were committed by local, not state, officers. U.S. Br. 30. Similarly, eleven of the sixteen cases cited by the government to show a pattern of unconstitutional mistreatment of disabled prisoners by the States involve local, territorial, and federal jails[12] or do not contain any finding of a constitutional violation.[13] The handful of remaining cases do not demonstrate any widespread pattern of Eighth Amendment violations by state correctional officials.

---

[11] *E.g., Stewart v. Stewart*, 521 N.E.2d 956 (Ind. Ct. App. 1988) (holding HIV infected father's visitation rights improperly terminated) (U.S. Br. App. 11a); *Moye v. Moye*, 627 P.2d 799 (Idaho 1981) (reversing custody award based on overemphasis of mother's epilepsy) (U.S. Br. App. 10a); *In re Marriage of Carney*, 598 P.2d 36 (Cal. 1979) (lower court improperly stereotyped abilities of handicapped parent) (U.S. Br. App. 10a).

[12] *E.g., Leach v. Shelby County Sheriff*, 891 F.2d 1241 (6th Cir. 1989) (county jail) (U.S. Br. App. 3a), *cert. denied*, 495 U.S. 932 (1990); *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987) (federal) (U.S. Br. App. 3a); *Miranda v. Munoz*, 770 F.2d 255 (1st Cir. 1985) (Puerto Rico) (U.S. Br. App. 3a); *Carty v. Farrelly*, 957 F. Supp. 727 (D.V.I. 1997) (Virgin Islands) (U.S. Br. App. 6a).

[13] *E.g., Key v. Grayson*, 179 F.3d 996 (6th Cir. 1999) (claims under ADA and Rehabilitation Act) (U.S. Br. App. 2a), *cert. denied*, 528 U.S. 1120 (2000); *Love v. Westville Corr. Ctr.*, 103 F.3d 558 (7th Cir. 1996) (claims under ADA) (U.S. Br. App. 2a).

Institutionalization. The only area in which the United States comes close to demonstrating any basis for an exercise by Congress of its section 5 authority involves the record of state institutions for the mentally and developmentally disabled. U.S. Br. 31-32; U.S. Br. App. C. That observation, however, merely serves to underscore Title II's fatal lack of congruence and proportionality. The information before Congress about conditions at such institutions in some States cannot fairly be claimed to supply an adequate predicate for Title II's application to every state building and service or for the extra-constitutional obligations it imposes on all States with regard to the vast majority of their physically and mentally disabled citizens who are not, and never have been, institutionalized.

C. In the final analysis, the government's attempt to defend Title II's breathtaking scope as an appropriately "comprehensive remedy ... [for] an all-encompassing, inter-connected problem," U.S. Br. 49-50, amounts to a frontal assault on this Court's decision in *Cleburne*. The rationale advanced by the United States in support of Title II – the need to eradicate "entrenched stereotypes, fear, prejudices, and ignorance about individuals with disabilities," U.S. Br. 46 – is the same one *Cleburne* flatly rejected as a basis for affording the handicapped heightened protection under the Fourteenth Amendment. Title II assumes that, in the administration of every facet of their "services, programs, or activities," 42 U.S.C. § 12132, "the States as governmental entities ... embody the misconceived or malicious perceptions of some of their citizens" toward the disabled. *Garrett*, 521 U.S. at 375 (Kennedy & O'Connor, JJ., concurring). Because Congress had no basis

in fact for indulging that assumption, it lacked authority under section 5 to apply Title II to the States.

CONCLUSION

For the reasons stated here and in petitioner's initial brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General & Reporter
for the State of Tennessee

MICHAEL E. MOORE*
Solicitor General
*Counsel of Record

S. ELIZABETH MARTIN
MARY MARTELLE COLLIER
Senior Counsel

OFFICE OF THE ATTORNEY GENERAL &
REPORTER FOR THE STATE OF
TENNESSEE
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-3226

Attorneys for Petitioner

(7)

Supreme Court, U.S.
FILED
NOV 12 2003
OFFICE OF THE CLERK

No. 02-1667

In the Supreme Court of the United States

STATE OF TENNESSEE, PETITIONER

v.

GEORGE LANE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
R. ALEXANDER ACOSTA
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General
JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
KEVIN RUSSELL
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

64

QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, exceeds Congress's authority under Section 5 of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Summary of argument	5
Argument:	
Because it both remedies the continuing effects of past constitutional violations and combats an enduring problem of unconstitutional mistreatment of individuals with disabilities, Title II of the Americans with Disabilities Act is valid Section 5 legislation	7
A. Title II of the Disabilities Act targets distinctly governmental activities that often burden the exercise of fundamental rights	8
B. Title II responds to a long history and a continuing problem of unconstitutional treatment of individuals with disabilities	14
1. Congress exhaustively investigated disability discrimination	14
2. Congress amassed voluminous evidence of historic and enduring discrimination and deprivation of fundamental rights by states	17
a. Historic discrimination	17
b. Enduring unconstitutional treatment	19
(i) Access to the courts	21
(ii) Participation in the judicial process	23
(iii) Education	24
(iv) Voting	27
(v) Access to government officials and proceedings	28

Table of Contents—Continued: Page

(vi) Law enforcement 30
(vii) Child custody 30
(viii) Institutionalization 31
(ix) Zoning 33
(x) Licensing 33
(xi) Public transportation 33
(xii) Prison conditions 34
(xiii) Other public services 35
3. Other evidence confirms the problem 35
4. The constitutional significance of unfair treatment in government services 36
5. Title II is constitutional in its entirety 38
6. State laws provide insufficient protection 41
C. The Americans with Disabilities Act is reasonably tailored to remedying and preventing unconstitutional treatment of persons with disabilities 44
1. Title II's terms are tailored to the constitutional problems its remedies 44
2. Title II is as broad as necessary 49
Conclusion 50

TABLE OF AUTHORITIES

Cases:

Alexander v. *Choate*, 469 U.S. 287 (1985) 18
Alsbrook v. *Arkansas*, cert. granted, 528 U.S. 1146 and cert. dismissed, 529 U.S. 1001 (2000) 18, 33
Anderson County Quarterly Ct. v. *Judges of the 28th Judicial Circuit*, 579 S.W.2d 875 (Tenn. Ct. App. 1978) 12
Atkin v. *Kansas*, 191 U.S. 207 (1903) 12
Board of County Comm'rs v. *Umbehr*, 518 U.S. 68 (1996) 10

Cases—Continued: Page

Board of Educ. v. *Rowley*, 458 U.S. 176 (1982) 19
Board of Trs. of the Univ. of Ala. v. *Garrett*, 531 U.S. 356 (2001) ..... *passim*
Brown v. *Board of Educ.*, 347 U.S. 483 (1954) 24, 25
Buck v. *Bell*, 274 U.S. 200 (1927) 18
Carey v. *Piphus*, 435 U.S. 247 (1978) 23
Carrington v. *Rash*, 380 U.S. 89 (1965) 47
City of Boerne v. *Flores*, 521 U.S. 507 (1997) 8, 14, 39, 40, 41
City of Cleburne v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) 14, 17, 19, 20, 37, 45
City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989) 40
City of Rome v. *United States*, 446 U.S. 156 (1980) 39
College Sav. Bank v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) 9
EEOC v. *Wyoming*, 460 U.S. 226 (1983) 11
Edmonson v. *Leesville Concrete Co.*, 500 U.S. 614 (1991) 21, 24
Employment Div. v. *Smith*, 494 U.S. 872 (1990) 36
Faretta v. *California*, 422 U.S. 806 (1975) 21
Farmer v. *Brennan*, 511 U.S. 825 (1994) 34
Florida Prepaid Postsecondary Educ. Expense Bd. v. *College Sav. Bank*, 527 U.S. 627 (1999) 9, 17, 21, 44
Fullilove v. *Klutznick*, 448 U.S. 448 (1980) 15
Gaston County v. *United States*, 395 U.S. 285 (1969) 39, 46
Goldberg v. *Kelly*, 397 U.S. 254 (1970) 31
Griffin v. *Breckenridge*, 403 U.S. 88 (1971) 40
Guthrie v. *State*, 194 P.2d 895 (Okla. Crim. App. 1948) 24
J.E.B. v. *Alabama*, 511 U.S. 127 (1994) 23, 24
Jackson v. *Indiana*, 406 U.S. 715 (1972) 31
Kimel v. *Florida Bd. of Regents*, 528 U.S. 62 (2000) 7, 9, 10, 44

Cases—Continued: Page

Lawrence v. *Texas*, 123 S. Ct. 2472 (2003) 38
Lawrence County v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985) 12
Little v. *Streater*, 452 U.S. 1 (1981) 47
M.L.B. v. *S.L.J.*, 519 U.S. 102 (1996) 47
Marriage of Carney, In re, 598 P.2d 36 (Cal. 1979) 31
Memorial Hosp. v. *Maricopa County*, 415 U.S. 250 (1974) 47
NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) 29
Nevada Dept of Human Res. v. *Hibbs*, 123 S. Ct. 1972 (2003) ..... *passim*
O'Connor v. *Donaldson*, 422 U.S. 563 (1975) 31
Olmstead v. *L.C.*, 527 U.S. 581 (1999) 17, 46, 47
Oregon v. *Mitchell*, 400 U.S. 112 (1970) 40
Palmore v. *Sidoti*, 466 U.S. 429 (1984) 37
Parrish v. *Johnson*, 800 F.2d 600 (6th Cir. 1986) 34
Plyler v. *Doe*, 457 U.S. 202 (1982) 24, 38
Popovich v. *Cuyahoga Court of Common Pleas*, 276 F.3d 808 (6th Cir.), cert. denied, 537 U.S. 812 (2002) 5
Puerto Rico Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 5
Reynolds v. *Sims*, 377 U.S. 533 (1964) 27
Rhodes v. *Chapman*, 452 U.S. 337 (1981) 34
Rice v. *Cayetano*, 528 U.S. 495 (2000) 45
Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980) 21
Romer v. *Evans*, 517 U.S. 620 (1996) 23, 29, 37, 38
Saenz v. *Roe*, 526 U.S. 489 (1999) 7, 36
Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 9
Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 20
South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 13, 15, 23, 39, 46
Stanley v. *Illinois*, 405 U.S. 645 (1972) 31

Cases—Continued: Page

State v. *Board of Educ.*, 172 N.W. 153 (Wis. 1919) 19
State v. *Spivey*, 700 S.W.2d 812 (Mo. 1985) 24
State Dep't of Highway Safety v. *Rendon*, 832 So. 2d 141 (Fla. Dist. Ct. App. 202), review denied, 851 So. 2d 729 (Fla. 2003), petition for cert. pending, No. 03-559 (filed Oct. 13, 2003) 11
Stump v. *Sparkman*, 435 U.S. 349 (1978) 20
Taylor v. *Louisiana*, 419 U.S. 522 (1975) 23
Thompson v. *Colorado*, 278 F.2d 1020 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002) 11
Troxel v. *Granville*, 530 U.S. 57 (2000) 31, 36
United States v. *Cruikshank*, 92 U.S. 542 (1875) 28
United States v. *Raines*, 362 U.S. 17 (1960) 40
United States v. *Virginia*, 518 U.S. 515 (1996) 48
Waller v. *Georgia*, 467 U.S. 39 (1984) 21
Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 38
Young, Ex parte, 209 U.S. 123 (1908) 11
Youngberg v. *Romeo*, 457 U.S. 307 (1982) 31

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) 11
Amend. I 6
Amend. IV 6
Amend. V 6
Amend. VI 6, 21
Amend. VIII 6
Amend. XI 3, 5, 7
Amend. XIII, § 2 40
Amend. XIV 21, 30, 44
§ 1 12
Due Process Clause 21, 23
Equal Protection Clause 48
§ 5 ..... *passim*

Constitution, statutes and regulations—Continued:	Page
Amend. XV, § 2	40
Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*	1
42 U.S.C. 12101(a)(2)	2
42 U.S.C. 12101(a)(3)	2, 9, 27
42 U.S.C. 12101(a)(5)	2
42 U.S.C. 12101(a)(7)	2, 10, 27
42 U.S.C. 12101(a)(9)	10
42 U.S.C. 12101(b)(1)	1
42 U.S.C. 12101(b)(4)	2
Title I, 42 U.S.C. 12111 *et seq.*	3, 8, 10
42 U.S.C. 12111(10)	47
42 U.S.C. 12112(b)(5)(A)	47
Title II, 42 U.S.C. 12131 *et seq.*	*passim*
42 U.S.C. 12131(1)(A)	3, 9
42 U.S.C. 12131(1)(B)	3, 9
42 U.S.C. 12131(2)	45, 47
42 U.S.C. 12132	3, 45
42 U.S.C. 12133	3
42 U.S.C. 12134	3
Title III, 42 U.S.C. 12181 *et seq.*	3
Title IV, 42 U.S.C. 12201 *et seq.*:	
42 U.S.C. 12202	3
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.*	40, 48
Rehabilitation Act of 1973 § 504, 29 U.S.C. 794	3
Rehabilitation Amendments of 1984, Pub. L. No. 98-221, Title I, § 141(a), 98 Stat. 26	15
Rehabilitation Amendments of 1986, Pub. L. No. 99-506, Title V, § 502(b), 100 Stat. 1807	15
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*	13
28 U.S.C. 2403	5
42 U.S.C. 1400(c)(2)(C)	25
Ariz. Rev. Stat. § 36-551(11)(b) (1986)	42
Ark. Code Ann. title 16, ch. 31 (Michie 1999)	24
Fla. Stat. Ann. § 40.01 (2003)	24

Statutes and regulations—Continued:	Page
La. Rev. Stat. Ann. § 13:3041 (1991)	24
Mich. Comp. Laws Ann. (West 2003):	
§ 729.204	24
§ 730.254	24
§ 730.404	24
N.H. Rev. Stat. Ann. § 354-A:3 (XIII) (1984)	42
Tenn. Code Ann. (2003):	
§ 22-2-304(c)	24
§ 22-2-304(d)(3)	24
28 C.F.R.:	
Section 35.130(b)(1)(i)	3
Section 35.130(b)(1)(iii)	3
Section 35.130(b)(1)(vii)	3
Section 35.130(b)(7)	4, 47
Section 35.150(a)	4
Section 35.150(a)(1)	4
Section 35.150(a)(3)	47
Section 35.151	4
Section 35.164	47
Miscellaneous:	
Advisory Comm'n on Intergovernmental Relations, *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* (Apr. 1989)	22
Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Res. and the Subcomm. on the Handicapped, 101st Cong., 1st Sess. (1989)	28, 29, 35, 42, 43
M. Burgdorf & R. Burgdorf, *A History of Unequal Treatment*, 15 Santa Clara Lawyer 855 (1975)	18, 19
California Att'y Gen., *Commission on Disability: Final Report* (Dec. 1989)	25, 26, 30, 32, 42

Miscellaneous—Continued: Page

Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) 32

Civil Rights of Institutionalized Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) 32

Civil Rights of Institutionalized Persons: Hearings S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) 32

R. Colker & A. Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075 (Summer 2002) 43

132 Cong. Rec. 10,589 (1986) 32

134 Cong. Rec. 9384-9385 (1988) 42

136 Cong. Rec.:

p. 10,913 25

p. 11,455 42

p. 11,461 42

T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temple L. Rev. 393 (1991) 19

Department of Health & Human Servs., *Visions of Independence, Productivity, Integration for People with Developmental Disabilities* (1990) 42

Department of Justice:

Enforcing the ADA: A Status Report from the Dep't of Justice:

Oct.-Dec. 1994 29

Jan.-Mar. 1997 24

Apr.-June 1997 ..... 23, 30

July-Sept. 1997 29

Apr.-June 1998 ..... 23, 24

Apr.-June 1999 23

Apr.-Sept. 2000 23

Miscellaneous—Continued: Page

Apr.-June 2001 23

Oct.-Dec. 2001 29

Apr.-June 2002 23

Oct.-Dec. 2002 23

Enforcing the ADA: Looking Back on a Decade of Progress (July 2000) 29

Notice of Findings Regarding Hinds County Detention Ctr. (1986) 35

Notice of Findings Regarding Los Lunas Hosp. & Training Sch. (1988) 32

Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Pub. Welfare, 93d Cong., 1st Sess. (1973):

Pt. 1 ..... 25, 26

Pt. 2 25

Employment Discrimination Against Cancer Victims and the Handicapped: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. and Labor, 99th Cong., 1st Sess. (1985) 43

Equal Access to Voting for Elderly and Disabled Persons: Hearing Before the Task Force on Elections of the House Comm. on House Admin., 98th Cong., 1st Sess. (1984) 27, 28

FEC, *Polling Place Accessibility in the 1998 General Election* (1989) 28

J. Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help?*, 40 Ark. L. Rev. 261 (1986) 42, 43

GAO, *Briefing Report on Cost of Accommodations, Americans with Disabilities Act: Hearing Before the House Comm. on Small Business*, 101st Cong., 2d Sess. (1990) 47

H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965) 14

H.R. Rep. No. 485, 101st Cong., 2d Sess. (1990):

Pt. 2 ..... *passim*

Pt. 3 ..... 30, 31

Miscellaneous—Continued: Page

Louis Harris & Assocs.:
The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream (1986) 17
The ICD Survey II: Employing Disabled Americans (1987) 17
Help America Vote Act of 2001: Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. (2001) 28
B. Hoffman, *Employment Discrimination Based on Cancer History*, 59 Temple L.Q. 1 (1986) 43
Governor J. Kitzhaber, *Proclamation of Human Rights Day, and Apology for Oregon's Forced Sterilization*, Speech at Salem, Or. (Dec. 2, 2002) (available at <http://arcweb.sos.state.or.us/governors/Kitzhaber/web_pages/governor/speeches/s021202.htm>) 20, 32
Look Back at Oregon's History of Sterilizing Residents of State Institutions (National Pub. Radio Broadcast Dec. 2, 2002) 20
National Council on the Handicapped:
On the Threshold of Independence (1988) 15, 26
Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disablities (1986) 15, 26
Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979) 18
P. Reilly, *The Surgical Solution* (1991) 20
Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic (1988) 17
S. Rep. No. 162, 89th Cong., 1st Sess. Pt. 3 (1965) 14
S. Rep. No. 116, 101st Cong., 1st Sess. (1989) ..... *passim*
J. Shapiro, *No Pity* (1994) 26, 31
Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* (Comm. Print 1990):
Vol. 2 ..... *passim*
Vol. 3 ..... 18, 35, 42, 43, 47, 48

Miscellaneous—Continued: Page

Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* (1990) 16, 17, 30, 4
Texas Civil Rights Project, *Courts Closed to Justice: A Survey of Courthouse Accessibility in Texas for People with Disabilities* (Nov. 1996) 22
United States Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* (1983) ..... *passim*
Voting Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. (1965) 14
Voting Rights: Hearings Before the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. (1965) 14

In the Supreme Court of the United States

No. 02-1667

STATE OF TENNESSEE, PETITIONER

v.

GEORGE LANE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The court of appeals' amended opinion on rehearing (Pet. App. 1-5) is reported at 315 F.3d 680. The original opinion of the court of appeals (Pet. App. 10-11) and the order of the district court (Pet. App. 6-7) are unreported.

JURISDICTION

The court of appeals entered its original judgment on July 16, 2002, and its amended opinion on rehearing on January 10, 2003. On March 4, 2003, Justice Stevens extended the time within which to file a petition for a writ of certiorari to May 12, 2003, and the petition was filed on that date. The petition was granted, limited to Question 1, on June 23, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that "historically, society has

tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, Congress found that persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). Congress concluded that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" to enact the Disabilities Act. 42 U.S.C. 12101(b)(4).

The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities. This case arises under Title II of the Disabilities Act, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B). Title II may be enforced through private suits against public entities. 42 U.S.C. 12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

Title II prohibits governments from, among other things, denying a benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii), (vii).[1] In addition, a public entity must make reasonable modifications in its policies, practices, or procedures if necessary to avoid the exclusion of individuals with disabilities, unless the accommodation would impose an undue financial or administrative burden on the

---

[1] Congress instructed the Attorney General to issue regulations to implement Title II, based on regulations previously promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. See 42 U.S.C. 12134.

government, or would fundamentally alter the nature of the service. See 28 C.F.R. 35.130(b)(7). The Disabilities Act does not normally require a public entity to make its existing physical facilities accessible. 28 C.F.R. 35.150(a)(1). Public entities need only ensure that "each service, program or activity, * * * when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a). However, building construction or alterations undertaken after Title II's effective date must be designed to provide accessibility. 28 C.F.R. 35.151.

2. Respondents George Lane and Beverly Jones have paraplegia and use wheelchairs to ambulate. Pet. App. 13. In 1996, petitioner charged Lane with two misdemeanor offenses and summoned him to appear in the Polk County Courthouse to answer the charges. *Id.* at 15-16. All court proceedings in that courthouse take place on the second floor of a building that, at that time, had no elevator. At his first appearance, Lane crawled up two flights of stairs to get to the courtroom. On his second visit, he was arrested after he "sent word to the court that he would not crawl to the courtroom again" and further declined to be carried by officers. *Id.* at 15. The court conducted subsequent proceedings with Lane waiting on the ground floor while his attorney shuttled back and forth between Lane and the second-floor courtroom. *Id.* at 15-16. The trial court later held the criminal case in abeyance while an elevator was constructed. *Id.* at 17.

Respondent Jones is a certified court reporter who must attend court proceedings to perform her job. Because many courtrooms in Tennessee are inaccessible to people in wheelchairs, she has been unable to complete a number of assignments, has not been able "to participate in the judicial process," and has otherwise been denied "access[]" to "the services of the judiciary." Pet. App. 19-20.

Respondents filed suit against petitioner and 25 Tennessee counties alleging past and ongoing violations of Title II based on the physical inaccessibility of courthouses within the State. Pet. App. 12-28. Respondents also seek to represent a class of persons who, because of their physical disabilities, cannot climb stairs or ascend steep inclines in Tennessee courthouses. *Id.* at 26. Respondents seek injunctive relief and damages. *Id.* at 27-28. Petitioner filed a motion to dismiss on the ground of Eleventh Amendment immunity, which the district court denied. *Id.* at 11.

3. Petitioner filed an interlocutory appeal, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), and the United States intervened to defend the constitutionality of Title II and Congress's abrogation of Eleventh Amendment immunity, see 28 U.S.C. 2403.

While the appeal was pending, the Sixth Circuit issued its en banc opinion in *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808, cert. denied, 537 U.S. 812 (2002), which held that the Disabilities Act's abrogation of Eleventh Amendment immunity is valid for claims based on due process principles, but not for claims based on equal protection principles. The court then affirmed the denial of petitioner's motion to dismiss on the ground that respondents' claims are based on due process principles. Pet. App. 10-11. On rehearing, the panel issued an amended opinion (*id.* at 1-5) explaining that plaintiffs' claims are based on due process principles because "physical barriers in government buildings, including courthouses and in the courtrooms themselves, have had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights." *Id.* at 4.

SUMMARY OF ARGUMENT

Application of Title II of the Americans with Disabilities Act to States and their subdivisions falls squarely within

Congress's comprehensive legislative power under Section 5 of the Fourteenth Amendment to prohibit, remedy, and prevent violations of the rights secured by that Amendment. In enacting Title II, Congress focused its legislative attention on the specific problem of discriminatory access to state and local government services; it did not simply extend a policy focused on the private sector to the government.

After decades of study, Congress determined that persons with disabilities had suffered from a virulent history of official governmental discrimination, isolation, and segregation. Congress found, moreover, that such discrimination and segregation, like race and gender discrimination, have repercussions that have persisted over the years and that continue to be manifested in decisionmaking by state and local officials across the span of governmental operations. That official discrimination results not just in the denial of the equal protection of the laws and equal access to governmental benefits, but also in the deprivation of fundamental rights, such as the rights of access to the courts, to vote, to substantive and procedural due process, to petition government officials, and to other protections of the First, Fourth, Fifth, Sixth, and Eighth Amendments.

In Title II, Congress formulated a statute that, much like federal laws combating racial and gender discrimination, is carefully designed to root out present instances of unconstitutional discrimination, to undo the effects of past discrimination, and to prevent future unconstitutional treatment by prohibiting discrimination and promoting integration where reasonable. At the same time, the Disabilities Act preserves the latitude and flexibility that States legitimately require in the administration of their programs and services. The Disabilities Act accomplishes those objectives by requiring States to afford persons with disabilities genuinely equal access to services and programs, while at the same time confining the statute's protections to *qualified* individuals

who, by definition, meet all of the States' legitimate and essential eligibility requirements. The Act only requires reasonable modifications for individuals with disabilities that do not impose an undue burden and do not fundamentally alter the nature or character of the governmental program. The statute is thus carefully tailored to prohibit state conduct that presents a substantial risk of violating the Constitution or that unreasonably perpetuates the exclusionary effects of prior unconstitutional treatment and exclusion.

ARGUMENT

BECAUSE IT BOTH REMEDIES THE CONTINUING EFFECTS OF PAST CONSTITUTIONAL VIOLATIONS AND COMBATS AN ENDURING PROBLEM OF UNCONSTITUTIONAL MISTREATMENT OF INDIVIDUALS WITH DISABILITIES, TITLE II OF THE AMERICANS WITH DISABILITIES ACT OF 1990 IS VALID SECTION 5 LEGISLATION

Section 5 of the Fourteenth Amendment is an affirmative grant of legislative power, see *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 80 (2000), that gives Congress the "authority both to remedy and to deter violation of [Fourteenth Amendment] rights * * * by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," *Nevada Dep't of Human Res.* v. *Hibbs*, 123 S. Ct. 1972, 1977 (2003) (quoting *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001)). Section 5 thus "gives Congress broad power indeed," *Saenz* v. *Roe*, 526 U.S. 489, 508 (1999), including the power to remedy past violations of constitutional rights, to enact "prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct," and to abrogate the States' Eleventh Amendment immunity, *Hibbs*, 123 S. Ct. at 1977. Such legislation, however, must demonstrate a "congruence and

proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). Title II of the Disabilities Act is appropriate Section 5 legislation because it is reasonably designed to remedy a history of pervasive discrimination and deprivation of constitutional rights by States, to prevent continuing denials of constitutional rights, and to eradicate enduring false stereotypes that would otherwise freeze into place the effects of past unconstitutional treatment.

A. Title II Of The Disabilities Act Targets Distinctly Governmental Activities That Often Burden The Exercise Of Fundamental Rights

In *Garrett*, *supra*, this Court held that Title I of the Disabilities Act, 42 U.S.C. 12111 to 12117, which prohibits public and private employers from discriminating in employment, was not valid Section 5 legislation. 531 U.S. at 365-374. Title II, however, is fundamentally different from Title I in four constitutionally determinative respects.

First, in enacting Title I, Congress addressed issues that affect all employers—private or public sector—and simply included States within a general ban on employment discrimination, without considering sufficiently whether there was a distinctive problem of unconstitutional employment discrimination by the States. *Garrett*, 531 U.S. at 369-371. While Title I regulates States *qua* employers, Title II, by contrast, was enacted specifically and deliberately to regulate state and local governments *qua governments*. Congress thus legislated with both an appreciation for the unique status of state and local governments and a singular focus on the historic and enduring problem of official discrimination and unconstitutional treatment on the basis of

disability by "any State or local government," 42 U.S.C. 12131(1)(A) and (B).[2]

For that reason, as *Garrett* acknowledged, Title II is predicated on a more substantial legislative record pertaining to "discrimination by the States in the provision of public services." 531 U.S. at 371 n.7; see Section B(2), *infra*. That legislative record, in turn, led Congress to make specific findings about the historic and enduring problem of discrimination by States and their subdivisions. In particular, Congress found that "discrimination against individuals with disabilities persists in such critical areas as * * * education, transportation, * * * institutionalization, * * * voting, and access to public services." 42 U.S.C. 12101(a)(3). Those are areas for which States and their subdivisions are either exclusively or predominantly responsible. Contrast *Garrett*, 531 U.S. at 371 (no findings about state employment discrimination). In addition, the same committee reports that the Court in *Garrett* found lacking with regard to public employment, 531 U.S. at 371-372, are directly on point here, declaring that "there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the area[] of * * * public services." H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at

---

[2] In a number of other cases, Congress likewise invoked its Section 5 power simply to "place States on the same footing as private parties." *Kimel*, 528 U.S. at 82; see *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 631-632 (1999); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). While congressional efforts to regulate States *qua* employers could have been understood by Members of Congress (prior to this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996)) to depend critically on Congress's ability to abrogate States' immunity under the Commerce Clause, Congress's regulation in Title II of the States' provision of public services perforce accounted for the States' governmental character and thus necessarily implicated the Section 5 power.

28 (1990); see also S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989) ("Discrimination still persists in such critical areas as * * * public services."). Congress thus specifically concluded, on the basis of a weighty legislative record, that States were contributors to the "history of purposeful unequal treatment" and participants in "the continuing existence of unfair and unnecessary discrimination and prejudice" against individuals with disabilities, 42 U.S.C. 12101(a)(7) and (9)—and those "conclusions are entitled to much deference." *Kimel*, 528 U.S. at 81.

Second, because Title I pertains to employment, decisions made by state employers concerning individuals with disabilities implicate only the Equal Protection Clause's guarantee against irrational employment decisions. *Garrett*, 531 U.S. at 366-368. Like *Kimel*, 528 U.S. at 83, Title I thus addressed state conduct in an area where the States, as sovereigns, are given an extraordinarily wide berth and constitutional violations are infrequently found. See, *e.g.*, *Hibbs*, 123 S. Ct. at 1981-1982; *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 676 (1996).

Title II, by contrast, enforces not only the Equal Protection Clause, but also a wide array of fundamental constitutional rights—the right to petition the government, the right of access to the courts, the right to vote, Fourth and Eighth Amendment protections, and procedural and substantive due process. Indeed, Title I dealt only with the States' denial of an opportunity—employment—that individuals equally could pursue in the private sector. Title II, by contrast, regulates state and local governments when they intervene in and regulate the activities of private citizens, or deprive them of their liberty, property, or parental rights, often in contexts in which there is no private-sector alternative and the citizen has no ability to opt out. Title II also regulates a State's ability to deny a class of citizens access to government services upon which all citizens must rely for basic

opportunities (and sometimes the necessities) of modern life. The private sector cannot provide for binding judicial process, or the ability to cast a ballot, serve as a juror, adopt children, secure the protection of the police, or seek the enactment of legislation. Title II thus legislates in an area where the States' conduct often "triggers a heightened level of scrutiny," *Hibbs*, 123 S. Ct. at 1982, and where its ability to infringe those rights generally, let alone to deny them disparately to one particular segment of the population, is constitutionally curtailed. For that reason, it "was easier for Congress" to identify and "to show a pattern of state constitutional violations" in enacting Title II. *Ibid.*

Third, unlike *Kimel* and *Garrett*, this case implicates concerns beyond abrogation and the ability of individuals to sue the States for money damages. Because both *Kimel* and *Garrett* targeted *employment* discrimination, those decisions only invalidated the statutes' abrogation provisions; the substantive prohibitions of those laws remain applicable to the States pursuant to Congress's undoubted power to regulate employment under its Commerce Clause authority, and they can be enforced against state officials under *Ex parte Young*, 209 U.S. 123 (1908). See *Garrett*, 531 U.S. at 374 n.9; *EEOC* v. *Wyoming*, 460 U.S. 226, 235-243 (1983). While petitioner concedes (Br. 16) that Title II's substantive provisions are valid Commerce Clause legislation, its state amici (Br. 22, 25) and a number of other States pointedly do not.[3] Accordingly, unless Title II is appropriate Commerce Clause legislation, the issue presented here draws into

---

[3] See *Thompson* v. *Colorado*, 278 F.3d 1020, 1025 n.2 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002); *State Dep't of Highway Safety* v. *Rendon*, 832 So. 2d 141, 146 n.5 (Fla. Dist. Ct. App. 2002), review denied, 851 So. 2d 729 (Fla. 2003), petition for cert. pending, No. 03-559 (filed Oct. 13, 2003); *Meyers* v. *Texas*, No. 02-50452 (5th Cir. argued Mar. 12, 2003); *McCarthy* v. *Hale*, No. 03-50608 (5th Cir.) (pending); *Doe* v. *Regier*, No. 03-2794 (Fla. Dist. Ct. App.) (pending).

question the power of Congress to require both States and local governments, whether through private damages actions, private injunctive actions, or suits by the United States itself, to make their buildings, programs, and public life accessible to a historically marginalized population.

Fourth, for all of the foregoing reasons, and especially because this case may implicate the constitutional authority for enactment of Title II's substantive prohibitions as applied to *all* levels of government, this Court is not constrained, as it was in *Garrett*, to consider only the legislative evidence of unconstitutional conduct directly by the States. When Congress specifically focuses the substantive provisions of Section 5 legislation jointly on the operations of state and local governments *qua* governments, its enforcement powers under Section 5, like the substantive protections of Section 1, can charge the States with some responsibility for the unconstitutional conduct of the subdivisions of government that the States themselves create and empower to act.[4]

That is, in part, because the line between state and local government is much harder to discern in the context of public services than it is in employment. While employment decisions can be made independently, the operations of state and local governments in the provision of government services, such as voting, education, welfare benefits, zoning, licensing, and the administration of justice are often closely intertwined. Indeed, in this case, the State uses county courthouses for the conduct of its own judicial business. Pet. App. 14-15; see generally *Anderson County Quarterly Court* v. *Judges of the 28th Judicial Circuit*, 579 S.W.2d 875 (Tenn. Ct. App. 1978). Likewise, with respect to education, States play a substantial role in directing, supervising, and limiting

[4] See *Atkin* v. *Kansas*, 191 U.S. 207, 220-221 (1903); *Lawrence County* v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 270-271 (1985) (Rehnquist, J., dissenting).

the discretion of local agencies, either by administrative supervision or by statutory direction. The complexity of the relationship between state and local governments in the administration of public services often raises difficult, state-by-state questions regarding whether a particular entity is operating as an "arm of the state." The record of historic and pervasive discrimination and unconstitutional treatment by all levels of government further blurs the line between state and local governmental action, because the conduct of local officials often may be traceable, at least in part, to the rules of state-mandated discrimination and segregation under which they operated for years.

Indeed, under similar circumstances, this Court has recognized the relevance of local governmental conduct in assessing the validity of Section 5 legislation as applied to the States. In both *Garrett* and *Hibbs*, the Court cited the substantive provisions of the Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*, which were upheld in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), as "appropriate" Section 5 legislation because that Act is predicated upon a documented "problem of racial discrimination in voting." *Garrett*, 531 U.S. at 373; see *Hibbs*, 123 S. Ct. at 1982. Much of the evidence of unconstitutional conduct described on the referenced pages of *South Carolina* (383 U.S. at 308-313), however, involved the conduct of *county* and *city* officials.[5] In fact, almost all of the evidence of specific instances of discrimination underlying the Voting Rights Act of 1965 concerned local officials rather than state officials; the rest of

[5] See *South Carolina*, 383 U.S. at 312 n.12 (discrimination by Montgomery County Registrar); *id.* at 312 n.13 (Panola County and Forrest County registrars); *id.* at 313 n.14 (Dallas County Board of Registrars); *id.* at 313 n.15 (Walker County registrar); *id.* at 314 ("certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls"); *id.* at 314-315 (Selma, Alabama, and Dallas County).

the evidence was either statistical evidence or lists of state laws.[6] See also *Flores*, 521 U.S. at 530-531 (in analyzing Section 5 as a source of power for the *substantive* provisions of a law, the Court did not distinguish between evidence of state and local governmental conduct). Thus, while Congress compiled ample evidence of unconstitutional conduct by the States themselves in enacting Title II, the constitutional question presented here, unlike *Garrett*, compels consideration of the evidence of local government discrimination as well.

B. Title II Responds To A Long History And A Continuing Problem Of Unconstitutional Treatment Of Individuals With Disabilities

1. Congress Exhaustively Investigated Disability Discrimination

In *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), this Court acknowledged the superior expertise of legislatures in addressing the "difficult" problem of discrimination against and mistreatment of individuals with disabilities. *Id.* at 443. "In identifying past evils," for which Section 5 legislation is appropriate, moreover, "Congress

[6] See, *e.g.*, *Voting Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 5-8 (1965) (voting discrimination by local officials in Selma, Alabama, and Dallas County); *id.* at 8 (abuses by local sheriff and deputy sheriff in Mississippi); *id.* at 36 (21 of 22 voting discrimination lawsuits filed by the Department of Justice in Mississippi were against counties); *Voting Rights: Hearings Before the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 12 (1965) (discrimination in Clarke County, Mississippi, and Wilcox County, Alabama); H.R. Rep. No. 439, 89th Cong., 1st Sess. 16 (1965) (parish registrars); S. Rep. No. 162, 89th Cong., 1st Sess. Pt. 3, at 7-9 (1965) (discrimination and litigation in Dallas County, Alabama); *id.* at 12 (counties' discriminatory use of "good moral character" test); *id.* at 33 (county officials' discriminatory use of poll tax).

obviously may avail itself of information from any probative source," *South Carolina*, 383 U.S. at 330, including

> the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Fullilove v. *Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring).

The Congress that enacted Title II of the Disabilities Act brought to that legislative process more than forty years of experience studying the scope and nature of discrimination against persons with disabilities and testing incremental legislative steps to combat that discrimination. See *Garrett*, 531 U.S. at 390-391 (Breyer, J., dissenting) (listing prior legislation). Building on that expertise, Congress commissioned two reports from the National Council on the Handicapped to report on the adequacy of existing federal laws and programs addressing discrimination against persons with disabilities.[7] Those studies revealed that "the most pervasive and recurrent problem faced by disabled persons appeared to be unfair and unnecessary discrimination." National Council on the Handicapped, *On the Threshold of Independence* 2 (1988) (*Threshold*); see National Council on the Handicapped, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities* (1986). Persons with disabilities reported "denials of educational opportunities, lack of access to public buildings and public bathrooms, [and] the absence of accessible

[7] See Rehabilitation Amendments of 1984, Pub. L. No. 98-221, Title I, § 141(a), 98 Stat. 26; Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Title V, § 502(b), 100 Stat. 1829.

transportation." *Threshold* 20-21, 41. Congress also learned of an "alarming rate of poverty," a dramatic educational gap, and a life of social "isolat[ion]" for persons with disabilities. *Id.* at 14.[8]

Congress itself engaged in extensive study and fact-finding concerning the problem of unconstitutional treatment of individuals with disabilities, holding 13 hearings devoted specifically to consideration of the Disabilities Act. See *Garrett*, 531 U.S. at 389-390 (Breyer, J., dissenting) (listing hearings). In addition, a congressionally designated Task Force held 63 public forums across the country that were attended by more than 30,000 individuals. Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 16 (1990) (*Task Force Report*). The Task Force also presented to Congress evidence submitted by nearly 5,000 individuals documenting the problems with discrimination and invidious stereotypes that persons with disabilities faced daily—often at the hands of state and local governments. See 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with*

[8] Twenty percent of persons with disabilities—more than twice the percentage for the general population—lived below the poverty line, and 15% of disabled persons had incomes of $15,000 or less. *Threshold* 13-14. Forty percent of persons with disabilities—triple the rate for the general population—did not finish high school. Only 29% of persons with disabilities had some college education, compared with 48% for the general population. *Id.* at 14. Two-thirds of all working-age persons with disabilities were unemployed; only one in four worked full-time. *Ibid.* Two-thirds of persons with disabilities had not attended a movie or sporting event in the past year; three-fourths had not seen live theater or music performances; persons with disabilities were three times more likely not to eat in restaurants; and 13% of persons with disabilities never went to grocery stores. *Id.* at 16-17.

Disabilities Act 1040 (Comm. Print 1990) (*Leg. Hist.*).[9] Congress also considered several reports and surveys. See S. Rep. No. 116, *supra*, at 6; H.R. Rep. No. 485, *supra*, Pt. 2, at 28; *Task Force Report* 16.[10]

2. Congress Amassed Voluminous Evidence Of Historic And Enduring Discrimination And Deprivation Of Fundamental Rights By States

a. *Historic Discrimination*: The "propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects.'" *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 640 (1999) (quoting *Flores*, 521 U.S. at 525). While petitioner and its seven amici States ignore it, Congress and this Court have long acknowledged the Nation's "history of unfair and often grotesque mistreatment" of persons with disabilities. *Cleburne*, 473 U.S. at 454 (Stevens, J., concurring); see also *Olmstead* v. *L.C.*, 527 U.S. 581, 608 (1999) (Kennedy, J., concurring) ("[O]f course, persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility."); *Cleburne*, 473 U.S. at 446 ("Doubtless, there have been and there will continue to be instances of dis-

[9] See also *Task Force Report* 16. Those "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life," 2 *Leg. Hist.* 1324-1325, are part of the official legislative history of the Disabilities Act, *id.* at 1336, 1389. Those submissions were lodged with the Court in *Garrett*, see 531 U.S. at 391-424 (Breyer, J., dissenting). Those submissions are cited herein by reference to the State and Bates stamp number, which is how they were lodged in *Garrett*.

[10] Those included the United States Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* (1983); two polls conducted by Louis Harris & Associates, *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream* (1986), and *The ICD Survey II: Employing Disabled Americans* (1987); the *Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic* (1988); and eleven interim reports submitted by the Task Force.

crimination against the retarded that are in fact invidious."); *Alexander* v. *Choate*, 469 U.S. 287, 295 n.12 (1985) ("well-cataloged instances of invidious discrimination against the handicapped do exist").

"[T]orture, imprisonment, and execution of handicapped people throughout history are not uncommon." United States Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* 18 n.5 (1983) (*Spectrum*). More often, "societal practices of isolation and segregation have been the rule." *Ibid.* From the 1920s to the 1960s, the eugenics movement labeled persons with mental and physical disabilities as "sub-human creatures" and "waste products" responsible for poverty and crime. *Id.* at 20. *Every single State*, by law, provided for the segregation of persons with mental disabilities and, frequently, epilepsy, and excluded them from public schools and other state services and privileges of citizenship.[11] States also fueled the fear and isolation of persons with disabilities by requiring public officials and parents to report and segregate into institutions the "feebleminded."[12]

Almost every State accompanied forced segregation with compulsory sterilization and prohibitions on marriage. See *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) ("It is better for all the world, if * * * society can prevent those who are manifestly unfit from continuing their kind. * * * Three generations of imbeciles are enough."); 3 *Leg. Hist.* 2242; M. Burgdorf & R. Burgdorf, *A History of Unequal Treatment* (*Unequal Treatment*), 15 Santa Clara Lawyer 855, 887-888

[11] See People First Amicus Br., App. A, *Alsbrook* v. *Arkansas*, cert. granted, 528 U.S. 1146 and cert. dismissed, 529 U.S. 1001 (2000) (No. 99-423) (*Compendium of State Laws*); see also Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979).

[12] *Spectrum* 20, 33-34; *Compendium of State Laws* A5, A21-A22, A25, A28-A29, A40, A44, A46-A49, A50-A51, A56, A61-A63, A65-A66, A71, A74-A75.

(1975). Children with mental disabilities "were excluded completely from any form of public education." *Board of Educ.* v. *Rowley*, 458 U.S. 176, 191 (1982). Numerous States also restricted the rights of the physically disabled to enter into contracts, *Spectrum* 40, while a number of large cities enacted "ugly laws," which prohibited the physically disabled from appearing in public. Chicago's law provided:

> No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places in this city, shall therein or thereon expose himself to public view, under a penalty of not less than one dollar nor more than fifty dollars for each offense.

Unequal Treatment 863 (quoting ordinance). Such laws were enforced as recently as 1974. *Id.* at 864.[13]

b. *Enduring Unconstitutional Treatment*: "Prejudice, once let loose, is not easily cabined." *Cleburne*, 473 U.S. at 464 (Marshall, J., concurring); see *Hibbs*, 123 S. Ct. at 1979 (noting the "persistence" of gender discrimination and the "firmly rooted" stereotypes that accompany it). Indeed, Congress found that "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right," and "[t]he result is massive, society-wide discrimination." S. Rep. No. 116, *supra*, at 8-9.

[13] See also *State* v. *Board of Educ.*, 172 N.W. 153, 153 (Wis. 1919) (approving exclusion of a boy with cerebral palsy from public school because he "produces a depressing and nauseating effect upon the teachers and school children") (noted at 2 *Leg. Hist.* 2243); see generally T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temple L. Rev. 393, 399-407 (1991).

That is because a concerted process of changing discriminatory laws, policies, practices, and stereotypical conceptions and prejudices did not even *begin* until the 1970s and 1980s. Cf. *Hibbs*, 123 S. Ct. at 1978. Even then, "out-dated statutes [were] still on the books, and irrational fears or ignorance, *traceable to the prolonged social and cultural isolation*" of those with disabilities "continue to stymie recognition of the[ir] dignity and individuality." *Cleburne*, 473 U.S. at 467 (Marshall, J., concurring) (emphasis added). The involuntary sterilization of the disabled is not distant history; it continued into the 1970s, and occasionally even into the 1980s—well within the lifetime of many current governmental decisionmakers. P. Reilly, *The Surgical Solution* 2, 148 (1991); *Look Back at Oregon's History of Sterilizing Residents of State Institutions* (National Pub. Radio broadcast Dec. 2, 2002). As recently as 1983, fifteen States continued to have compulsory sterilization laws on the books. *Spectrum* 37; see *Stump* v. *Sparkman*, 435 U.S. 349, 351 (1978) (state judge ordered the sterilization of a "somewhat retarded" 15-year-old girl); Reilly, *supra*, at 148-160; contrast *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942) (strict scrutiny governs sterilization classifications). Until the late 1970s, "peonage was a common practice in [Oregon] institutions." Governor J. Kitzhaber, *Proclamation of Human Rights Day, and Apology for Oregon's Forced Sterilization of Institutionalized Persons*, Speech at Salem, Or. (Dec. 2, 2002) (available at <http://arcweb.sos.state.or.us/governors/Kitzhaber/web_pages/governor/speeches/s021202.htm>). As of 1979, "most States still categorically disqualified 'idiots' from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials." *Cleburne*, 473 U.S. at 464 (Marshall, J., concurring).

Based on the evidence it amassed, Congress found, as a matter of present reality and historical fact, that persons

with disabilities have confronted "widespread and persisting deprivation of [their] constitutional rights" with respect to a broad array of public services. *Florida Prepaid*, 527 U.S. at 645; see 42 U.S.C. 12101(a)(2) and (3).

(i) Access to the courts: "Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds." *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 628 (1991). The Fourteenth Amendment protects the rights of civil litigants, criminal defendants, and members of the public to have access to the courts. *E.g.*, *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980). For individuals charged with crimes, like respondent Lane, the Due Process Clause and the Sixth Amendment afford the accused "a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings," *Faretta* v. *California*, 422 U.S. 806, 819 & n.15 (1975), a right that criminal proceedings generally be open to the public, *Waller* v. *Georgia*, 467 U.S. 39, 47 (1984), and a right to be tried by a jury of their peers, U.S. Const. Amend. VI. Yet Congress learned —as the present case well illustrates—that "[t]he courthouse door is still closed to Americans with disabilities"—literally. 2 *Leg. Hist.* 936 (Sen. Harkin).

> I went to the courtroom one day and * * * I could not get into the building because there were about 500 steps to get in there. Then I called for the security guard to help me, who * * * told me there was an entrance at the back door for the handicapped people. * * * I went to the back door and there were three more stairs for me to get over to be able to ring a bell to announce my arrival so that somebody would come and open the door and maybe let me in. * * * This is the court system that is supposed to give me a fair hearing. It took me 2 hours to get in. * * * And when [the judge] finally saw me in

> the courtroom, he could not look at me because of my wheelchair. * * * The employees of the courtroom came back to me and told me, "You are not the norm. You are not the normal person we see every day."

Id. at 1071 (Emeka Nwojke).

That was not an isolated incident. A report before Congress showed that 76% of state-owned buildings offering services and programs for the general public were inaccessible and unusable for persons with disabilities. *Spectrum* 39. State officials themselves "pointed to negative attitudes and misconceptions as potent impediments to [their own] barrier removal policies."[14] In addition, the Department of Justice's quarterly reports on its enforcement efforts under the Disabilities Act document numerous investigations into jurisdictions (including in Tennessee), whose courthouses and courtroom facilities are totally inaccessible to persons who use wheelchairs, have inaccessible jury boxes, witness stands, attorneys' areas, or spectator seats, do not provide sign language interpreters or other assistive listening devices to litigants, spectators, or other courtroom participants, or do

[14] Advisory Comm'n on Intergovernmental Relations, *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* 87 (Apr. 1989). See also Texas Civil Rights Project, *Courts Closed to Justice: A Survey of Courthouse Accessibility in Texas for People with Disabilities* 10 (Nov. 1996) (Texas Supreme Court, Court of Criminal Appeals, Austin Court of Appeals, Office of the Attorney General, and state law library remained inaccessible until suit filed under Title II); AL 15 ("A man, c lled to testify in court, had to get out of his wheelchair and physically pull himself up three flights of stairs to reach the courtroom."); WV 1745 (witness in court case had to be carried up two flights of stairs because the sheriff would not let him use the elevator); WY 1786 (individual unable to get a marriage license because the courthouse was not accessible); MA 812; CA 254; CO 273; ID 528; PA 1394; WA 1690; MS 990, 998; SD 1475; NC 1161-1164; AL 5; DE 345; GA 374; HI 455; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

not contain any accessible bathroom facilities.[15] Such findings properly inform the Court's evaluation of the propriety of Section 5 legislation. See *South Carolina*, 383 U.S. at 312. Further, that pattern of inaccessibility, marginalization, and constructive exclusion of defendants and civil litigants with disabilities denies those individuals "'the feeling of just treatment by the government'" that the Due Process Clause guarantees. *Carey* v. *Piphus*, 435 U.S. 247, 261 (1978). It is "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection * * * that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996).

(ii) Participation in the judicial process: "Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system." *J.E.B.* v. *Alabama*, 511 U.S. 127, 145 (1994). But differential treatment of individuals with disabilities affects their ability to be heard, to observe, and to participate meaningfully in judicial proceedings. See, *e.g.*, ID 506 (adult victims of abuse with developmental disabilities denied equal rights to testify in court). Furthermore, "excluding identifiable segments playing major roles in the community" from jury service "cannot be squared with the constitutional concept of jury service." *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975). Yet, to this day, petitioner continues to prohibit the "physically dis-

[15] See, *e.g.*, *Enforcing the ADA: A Status Report from the Dep't of Justice* (*ADA Report*), Oct.-Dec. 2002, at 7 (criminal defendant with hearing disability had difficultly obtaining interpreter); *id.*, Apr.-June, 2002, at 7-8 (inaccessible jury boxes); *id.*, Apr.- June, 2001, at 7 (inaccessible hearing rooms); *id.*, Apr.-Sept., 2000, at 8; *id.*, Apr.-June, 1999, at 8 (inaccessible courtroom entrance, seating areas, witness stand, jury box, jury room, and jury rest room); *id.*, Apr.-June, 1998, at 10; *id.*, Apr.-June, 1997, at 6. Appendix B to this brief contains a Table summarizing the Justice Department's enforcement efforts in this area.

abled" from serving as jurors. Tenn. Code Ann. § 22-2-304(c) and(d)(3) (1994); see Mich. Comp. Laws Ann. § 729.204 (West 2002) (board compiling jury list "shall select only the names of persons who are * * * not infirm or decrepit"); *id.* §§ 730.254, 730.404. Arkansas similarly prohibited the physically disabled from serving as jurors at the time of Title II's enactment.[16] When States categorically exclude individuals from jury service because of their disability, without regard to their ability to perform as jurors, the Constitution's "promise of equality dims, and the integrity of our judicial system is jeopardized." *J.E.B.*, 511 U.S. at 146; see *Edmonson*, 500 U.S. at 628.

(iii) Education: "[E]ducation is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). Indeed, "classifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions." *Plyler* v. *Doe*, 457 U.S. 202, 234 (1982) (Blackmun, J., concurring). Accordingly, where

[16] See Ark. Code. Ann., title 16, ch. 31 note (Michie 1999) (until 1994, state law prohibited "any person whose sense of hearing or seeing is substantially impaired" from serving as a juror); see also La. Rev. Stat. Ann. § 13:3041 (1991) (Hist. & Stat. Notes) (1966 amendment removed provision permitting judges to "hold prospective jurors incompetent because of physical infirmities"); Appendix B; *State* v. *Spivey*, 700 S.W.2d 812, 814-815 (Mo. 1985) (upholding the exclusion of deaf persons from the jury wheel); *ADA Report*, Jan.-Mar., 1997, at 5 (two jurisdictions disqualify prospective jurors because of deafness); Fla. Stat. Ann. § 40.01 (2003), Hist. & Stat. Notes (until 1979, the "physically or mentally infirm" were ineligible for jury service); *Guthrie* v. *State*, 194 P.2d 895, 902 (Okla. Crim. App. 1948) (Oklahoma law "pertaining to the qualifications of a juror prevents a person serving on the jury who is afflicted with a bodily infirmity amounting to a disability").

the State provides a public education, that right "must be made available to all on equal terms." *Brown*, 347 U.S. at 493.

But Congress learned that irrational prejudices, fears, and animus still operate to deny persons with disabilities an equal opportunity for public education. As recently as 1975, approximately 1 million disabled students were "excluded entirely from the public school system." 42 U.S.C. 1400(c)(2)(C). A quadriplegic woman with cerebral palsy and a high intellect was branded "retarded" by educators, denied placement in a regular school setting, and placed with emotionally disturbed children, where she was told she was "not college material." VT 1635. Other school districts also simply labeled as mentally retarded a blind child and a child with cerebral palsy. NB 1031; AK 38 (child with cerebral palsy subsequently obtained a Masters Degree). "When I was 5," another witness testified, "my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard." S. Rep. No. 116, *supra*, at 7.[17]

[17] See also Cal. Att'y Gen., *Commission on Disability: Final Report* 17, 81 (Dec. 1989) (*Cal. Report*) ("A bright child with cerebral palsy is assigned to a class with mentally retarded and other developmentally disabled children solely because of her physical disability"; in one town, all children with disabilities are grouped into a single classroom regardless of individual ability.); 136 Cong. Rec. 10,913 (1990) (Rep. McDermott) (school board excluded Ryan White, who had AIDS, not because the board "thought Ryan would infect the others" but because "some parents were afraid he would"); NY 1123 (three elementary schools locked mentally disabled children in a box for punishment); *Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Pub. Welfare*, 93d Cong., 1st Sess., Pt. 2, at 793 (1973) (Christine Griffith) (first-grade student "was spanked every day" because her deafness prevented her from following instructions); *id.*, Pt. 1, at 400 (Mrs. R. Walbridge) (student with spina bifida barred from the school library "because her braces and crutches made too much

State institutions of higher education acted on the same stereotypes and prejudices. Indeed, the "higher one goes on the education scale, the lower the proportion of handicapped people one finds." *Spectrum* 28; see *Threshold* 14. A person with epilepsy was asked to leave a state college because her seizures were "disrupt[ive]" and, officials said, created a risk of liability. 2 *Leg. Hist.* 1162 (Barbara Waters). A doctor with multiple sclerosis was denied admission to a psychiatric residency program because the state admissions committee "feared the negative reactions of patients to his disability." *Id.* at 1617 (Arlene Mayerson). Another witness explained that, "when I was first injured, my college refused to readmit me" because "it would be 'disgusting' to my roommates to have to live with a woman with a disability." WA 1733. Similarly, a student was denied a teaching assignment because administrators thought the students would react badly to her appearance. OR 1384.[18]

For both good and ill, "the law can be a teacher." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). As with race discrimination, few governmental messages more profoundly

noise"); *id.* at 384; 2 *Leg. Hist.* 989; *Spectrum* 28, 29; UT 1556; PA 1432; NM 1090; OR 1375; AL 32; SD 1481; MO 1014; NC 1144; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

[18] See also 2 *Leg. Hist.* 1224 (Denise Karuth) (state university forced blind student to drop music class because "you can't see"); *id.* at 1225 (state commission refused to sponsor legally blind student for masters degree in rehabilitation counseling because "the State would not hire blind rehabilitation counselors, '[s]ince,' and this is a quote: 'they could not drive to see their clients'"); J. Shapiro, *No Pity* 45 (1993) (Dean of the University of California at Berkeley told a prospective student that "[w]e've tried cripples before and it didn't work"); SD 1476; LA 999; MO 1010; WIS 1757; CO 283; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting); *Cal. Report* 138; Appendix A, *infra*.

affect individuals and their communities than segregation in education:

> Segregation in education impacts on segregation throughout the community. Generations of citizens attend school with no opportunity to be a friend with persons with disabilities, to grow together, to develop an awareness of capabilities * * * [.] Awareness deficits in our young people who become our community leaders and employers perpetuate the discrimination fostered in the segregated educational system.

MO 1007 (Pat Jones).

(iv) Voting: Because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims*, 377 U.S. 533, 561-562 (1964). Congress found, however, that persons with disabilities have been "relegated to a position of political powerlessness," 42 U.S.C. 12101(a)(7), and continue to be subjected to discrimination in voting, 42 U.S.C. 12101(a)(3). Congress made that finding after hearing that "people with disabilities have been turned away from the polling places after they have been registered to vote because they did not *look* competent." 2 *Leg. Hist.* 1220 (Nancy Husted-Jensen) (emphasis added). A deaf voter was told that "you still have to be able to use your voice" to vote. *Equal Access to Voting for Elderly and Disabled Persons: Hearings Before the Task Force on Elections of the House Comm. on House Admin.*, 98th Cong., 1st Sess. 94 (1984) (*Equal Voting Hearings*).[19]

[19] One voter was "told to go home once when I came to the poll and found the voting machines down a flight of stairs with no paper ballots available"; on another occasion that voter "had to shout my choice of candidates over the noise of a crowd to a precinct judge who pushed the levers of the machine for me, feeling all the while as if I had to offer an

The legislative record also documented that many persons with disabilities "cannot exercise one of your most basic rights as an American" because polling places or voting machines are inaccessible. S. Rep. No. 116, *supra*, at 12. As a consequence, persons with disabilities "were forced to vote by absentee ballot before key debates by the candidates were held." *Ibid.*; see also *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Res. and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 76 (1989) (*May 198[illegible] Hearings*) (Ill. Att'y Gen. Hartigan). Voting by absentee ballot also "deprives the disabled voter of an option available to other absentee voters, the right to change their vote by appearing personally at the polls on election day." 2 *Leg. Hist.* 1745 (Nanette Bowling). "How can disabled people have clout with our elected officials when they are aware that many of us are prevented from voting?" ARK 155.[20]

(v) Access to government officials and proceedings: "The very idea of a government, republican in form, implies a right on the part of its citizens to * * * petition for a redress of grievances," *United States* v. *Cruikshank*, 92 U.S. 542, 552-554 (1875), and that right cannot be denied to an entire class of citizens without compelling justification,

---

explanation for my decisions." *Equal Voting Hearings* 45; AL 16; *Help America Vote Act of 2001: Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. 15 (2001) ("Twice in Massachusetts and once in California, while relying on a poll worker to cast my ballot, the poll worker attempted to change my mind about whom I was voting for. * * * [T]o this day I really do not know if they cast my ballot according to my wishes."); *id.* at 13; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

[20] See *Equal Voting Hearings* 17, 461; 2 *Leg. Hist.* 1767; WS 1756; MT 1024, 1026-1027; MI 922; ND 1185; DE 307; AL 16; *Garrett*, 531 U.S. at 395-424 (Breyer, J., dissenting); FEC, *Polling Place Accessibility in the 1988 General Election* 7 (1989) (21% of polling places inaccessible; 27% were inaccessible in 1986).

NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982). State governments must "act as neutral entities, ready to take instruction and to enact laws when their citizens so demand." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). But government cannot take instruction from those whom it cannot see or hear. The Illinois Attorney General testified that he "had innumerable complaints regarding lack of access to public services—people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building." *May 1989 Hearings* 488, 491. Another individual, "who has been in a wheelchair for 12 years, tried three times last year to testify before state legislative committees. And three times, he was thwarted by a narrow set of Statehouse stairs, the only route to the small hearing room." IN 626. The Constitution prohibits laws "declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government," *Romer*, 517 U.S. at 633; governmental actions that have that same practical effect are equally pernicious.[21]

---

[21] See also H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2, at 40 (1990) (town hall and public schools inaccessible); *May 1989 Hearings* 663 (Dr. Mary Lynn Fletcher) (to attend town meetings, "I (or anyone with a severe mobility impairment) must crawl up three flights of circular stairs to the * * * room [where] all public business is conducted by the county government"); *id.* at 76; AK 73 (in response to complaints about lack of access to city and State buildings, City Manager responded that "[H]e runs this town * * * and no one is going to tell him what to do."); *ADA Report*, Oct.-Dec. 2001, at 9 (candidate for city council unable to access a city council platform to address constituents); *id.*, July-Sept. 1997, at 7-9 (State general assembly inaccessible); *id.*, Oct.-Dec. 1994, at 4-6 (access to town hall and polling places); Dep't of Justice, *Enforcing the ADA: Looking Back on a Decade of Progress* 4-8 (July 2000) (lack of access to public meetings, offices, and court proceedings); AL 17; IN 651; WS 1758; NY 1119; *Cal. Report* 70; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

(vi) Law Enforcement: Persons with disabilities have also been victimized in their dealings with law enforcement, in violation of their Fourteenth Amendment rights to due process and protection from unreasonable searches and seizures. When police in Kentucky learned that a man they arrested had AIDS, "[i]nstead of putting the man in jail, the officers locked him inside his car to spend the night." 2 *Leg. Hist.* 1005 (Belinda Mason). Police refused to accept a rape complaint from a blind woman because she could not make a visual identification. NM 1081. A person in a wheelchair was given a ticket and six-months' probation for obstructing traffic on the street, even though the person could not use the sidewalk because it lacked curb cuts. VA 1684. Persons with hearing impairments "have been arrested and held in jail over night without ever knowing their rights nor what they are being held for." 2 *Leg. Hist.* 1331 (Justin Dart). In addition, persons with disabilities like epilepsy are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, *supra*, Pt. 3, at 50.[22]

(vii) Child Custody: The Constitution protects and respects the sanctity of the parent-child relationship, *e.g.*,

[22] See *Cal. Report* 103 (parole agent "sent a man who uses a wheelchair back to prison since he did not show up for his appointments even though * * * he could not make the appointments because he was unable to get accessible transportation"); 2 *Leg. Hist.* 1115 (Paul Zapun) (sheriff threatens persons with disabilities who stop in town); *id.* at 1197 (police officer taunted witness by putting a gun to her head and pulling the trigger on an empty barrel, "because he thought it would be 'funny' since I have quadraparesis and couldn't flee or fight"); *Task Force Report* 21 (six wheelchair users *arrested* for failing to leave restaurant after manager complained that "they took up too much space"); *ADA Report*, Apr.-June 1997, at 5-7 (unreasonable treatment during traffic stop of deaf motorist); AL 6, DE 345, KS 673, WV 1746, IL 572 (all: lack of interpreter for deaf arrestee); 2 *Leg. Hist.* 1196; IL 569-570, 583; TX 1541; LA 748; *Cal. Report* 101-104; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

Troxel v. *Granville*, 530 U.S. 57 (2000); *Stanley* v. *Illinois*, 405 U.S. 645 (1972), and the Due Process Clause requires States to afford individuals with disabilities fair child custody proceedings, including the opportunity to be heard "at a meaningful time and in a meaningful manner," *Goldberg* v. *Kelly*, 397 U.S. 254, 267 (1970). But Congress heard that "clients whose children have been taken away from them a[re] told to get parent information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?" 2 *Leg. Hist.* 1331 (Justin Dart). Another government agency refused to authorize a couple's adoption of a child solely because the woman had muscular dystrophy. MA 829.[23]

(viii) Institutionalization: The Constitution protects individuals with disabilities from unjustified institutionalization and from unduly severe treatment while institutionalized. *Youngberg* v. *Romeo*, 457 U.S. 307, 315, 322 (1982); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975); *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972). Yet unconstitutional denials of appropriate treatment and unreasonable institutionalization of persons in state mental hospitals were commonplace. See 2 *Leg. Hist.* 1203 (Lelia Batten) (state hospitals are "notorious for using medication for controlling the behavior of clients and not for treatment alone.

[23] See H.R. Rep. No. 485, *supra*, Pt. 3, at 25; *id.*, Pt. 2, at 41 ("[B]eing paralyzed has meant far more than being unable to walk—it has meant being * * * deemed an 'unfit parent'" in custody proceedings.); 2 *Leg. Hist.* 1611 n.10 (Arlene Mayerson) ("Historically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent."); *Spectrum* 40; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting); *No Pity*, *supra*, at 26 (woman with cerebral palsy denied custody of her two sons); *In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979) (lower court "stereotype[d] William as a person deemed forever unable to be a good parent simply because he is physically handicapped"); Appendix A, *infra*.

Seclusion rooms and restraints are used to punish clients."); *id.* at 1262-1263 (Eleanor C. Blake) (detailing the "minimal, custodial, neglectful, abusive" care received at state mental hospital, and willful indifference resulting in rape); *Spectrum* 34-35.[24]

Indeed, in the years immediately preceding the enactment of Title II, the Department of Justice found unconstitutional treatment in state institutions for the mentally retarded or mentally ill in more than half of the States. One facility punished mentally retarded residents by forcing them to inhale ammonia fumes. See Department of Justice, Notice of Findings Regarding Los Lunas Hosp. & Training Sch. 2 (1988). Residents in other facilities lacked adequate food, clothing, and sanitation. Many state facilities failed to provide basic safety to individuals, resulting in serious physical injuries, sexual assaults, and deaths. See Appendix C, *infra*.

---

[24] See Oregon Gov. Kitzhaber, *supra* (admitting the use of "inhumane devices to restrain and control patients" until "the mid 1980's"); *Cal. Report* 114; 132 Cong. Rec. 10,589 (1986) (Sen. Kerry) ("appalling" findings in investigation of State-run mental health facilities; "The extent of neglect and abuse uncovered in their facilities was beyond belief."); *Civil Rights of Instit. Persons: Hearings on S. 1393 Before the Subcomm. on the Const. of the Sen. Comm. on the Judiciary*, 95th Cong., 1st Sess. 127 (1977) (Michael D. McGuire, M.D.) ("the personnel regarded patients as animals, * * * [and] group kicking and beatings were part of the program"); *id.* at 191-192; *Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 239 (1977) (Stanley C. Van Ness) (describing "pattern and practice of physical assaults and mental abuse of patients, and of unhealthy, unsanitary, and anti-therapeutic living conditions" in New Jersey institutions); *Civil Rights of Instit. Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 34 (1979) (Paul Friedman) ("[A] number of the residents were literally kept in cages"; patients "had regressed because of these shockingly inhumane conditions of confinement"); *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

(ix) Zoning: Congress knew that *Cleburne*, where this Court found unconstitutional disability discrimination in a zoning decision, was not an isolated incident. In Wyoming, a zoning board refused to authorize a group home because of "local residents' unfounded fears that the residents would be a danger to the children in a nearby school." WY 1781. In New Jersey, a group home for those who had suffered head injuries was barred because the public perceived such persons as "totally incompetent, sexual deviants, and that they needed 'room to roam.' * * * Officially, the application was turned down due to lack of parking spaces, even though it was early established that the residents would not have automobiles." NJ 1068.[25]

(x) Licensing: Licensing decisions by state and local officials evidenced yet another form of discriminatory treatment. The House Report discussed a woman who was denied a teaching credential, not because of her substantive teaching skills, but because of her paralysis. H.R. Rep. No. 485, *supra*, Pt. 2, at 29; see 2 *Leg Hist.* 1611 n.9 (Arlene Mayerson) (teaching license denied "on the grounds that being confined to a wheelchair as a result of polio, she was physically and medically unsuited for teaching").[26]

(xi) Public Transportation: Individuals reported discriminatory treatment on public transportation that lacked any rational basis and that "made no sense in light of how the [government] treated other groups similarly situated in relevant respects." *Garrett*, 531 U.S. at 366 n.4. One student testified:

---

[25] See also 2 *Leg. Hist.* 1230 (Larry Urban); People First Amicus Br. 20 n.94; AL 2, 31; CO 283; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting); Appendix A, *infra*.

[26] See TX 1549 (state licensing requirements for teaching deaf students require the ability to hear); CA 261; HI 479; TX 1528, 1542-1543; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

> Some of the drivers are very rude and get mad if I want to take the bus. Can you believe that? I work and part of my taxes pay for public buses and then they get mad just because I am using a wheelchair. * * * It is hard for people to feel good about themselves if they have to crawl up the stairs of a bus, or if the driver passes by without stopping.

2 *Leg. Hist.* 993 (Jade Calegory); MA 831 ("Blacks wanted to ride in the front of the bus. Disabled people just want[] on."). A high-level Connecticut transportation official responded to requests for accessibility by asking "Why can't all the handicapped people live in one place and work in one place? It would make it easier for us." 2 *Leg. Hist.* 1085; see also *id.* at 1097, 1190; WA 1716; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

(xii) Prison conditions: The Eighth Amendment protects inmates with disabilities against treatment that is deliberately indifferent to their serious medical needs and safety or imposes wanton suffering. *Farmer* v. *Brennan*, 511 U.S. 825 (1994); *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981). But Congress heard that "jailers rational[ize] taking away their wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs." 2 *Leg. Hist.* 1190 (Cindy Miller). Another prison guard repeatedly assaulted paraplegic inmates with a knife, forced them to sit in their own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead." *Parrish* v. *Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986).[27]

---

[27] *See Spectrum* 168; NM 1091 (prisoners with developmental disabilities subjected to longer prison terms); *ADA Report*, Apr.-June 1998, at 8-10 (longer pre-trial detention for detainees with disabilities; medical treatment and communications with family denied); Appendices A & C, *infra*. Individuals awaiting placement in State mental institutions in Mississippi were held in a county jail and routinely left for days shackled in a "drunk tank" without any mental health treatment or supervision. Dep't of Justice, Notice of Findings Regarding Hinds County Detention Ctr. 3 (1986).

(xiii) Other Public Services: The scope of the testimony offered to Congress regarding unconstitutional treatment touched virtually every aspect of individuals' encounters with their government, sweeping so broadly as to defy isolation into select categories of state action. Services and programs as varied as the operation of public libraries, public swimming pools and park programs, homeless shelters, and benefit programs exposed the discriminatory attitudes of officials.[28]

3. Other Evidence Confirms the Problem

In *Garrett*, Justice Kennedy suggested that, if a widespread problem of disability discrimination existed, "one would have expected to find * * * extensive litigation and discussion of the constitutional violations." 531 U.S. at 968. Appendix A to this brief provides a non-exhaustive list of cases in which courts have found discrimination and the

---

[28] A paraplegic Vietnam veteran was forbidden to use a public pool; the park commissioner explained that "[i]t's not my fault you went to Vietnam and got crippled." 3 *Leg. Hist.* 1872 (Peter Addesso); see also *id.* at 1995 (Rev. Scott Allen) (woman with AIDS and her children denied entry to a public swimming pool); 2 *Leg. Hist.* 1100, 1078, 1116; WS 1752 (deaf child denied swimming lessons); NC 1156 (mentally retarded child not allowed in pool); CA 166; MS 855; *May 1989 Hearings* 76 (Ill. Att'y Gen. Hartigan) (visually impaired children with guide dogs "cannot participate in park district programs when the park has a 'no dogs' rule"); NC 1155; PA 1391 (limiting library cards for "those having physical as well as mental disabilities"); CA 216 (wheelchair users not allowed in homeless shelter); CA 223 (same); DE 322 (same for mentally ill); KS 713 (discrimination in state job training program); IL 533 (female disability workshop participants advised to get sterilized); IA 664; AK 72, 145; OH 1218; AZ 116; AZ 127; HI 456; ID 541; see generally *Spectrum* App. A (identifying 20 broad categories of state-provided or supported services and programs in which discrimination against persons with disabilities arises).

deprivation of fundamental rights on the basis of disability. Many of the cases specifically found constitutional violations. In others, the facts support that conclusion, but the existence of statutory relief allowed the court to avoid the constitutional question. Federal efforts to enforce the rights of individuals with disabilities offer still more evidence. See Appendix B. The Department of Justice has found unconstitutional treatment of individuals with disabilities in institutions or prisons in more than 30 States. See Appendix C.

4. The Constitutional Significance of Unfair Treatment in Government Services

The foregoing record of extensive state and local discrimination in the provision of government services provides the necessary predicate for exercise of Congress's Section 5 enforcement power, for three reasons.

First, much of the identified state conduct interferes with or threatens the fundamental rights of individuals with disabilities, or occurs where the right to equal protection intersects with other constitutional rights, see *Employment Div.* v. *Smith*, 494 U.S. 872, 881 (1990). A particular class of individuals cannot be excluded from voting, participating in court proceedings, accessing public meetings and services, or raising their children based on nothing more than administrative convenience. Such infringements are unconstitutional "unless shown to be necessary to promote a compelling governmental interest." *Saenz*, 526 U.S. at 499; see *Troxel*, 530 U.S. at 65. State laws, like petitioner's, that exclude individuals with disabilities from jury service, see pages 23-24, *supra*, plainly fail such scrutiny and evidence the kind of lingering unconstitutional state action and "state-sanctioned stereotype[s]" that provide a valid predicate for Section 5 legislation. *Hibbs*, 123 S. Ct. at 1983.

Second, much of the identified conduct fails even rational basis scrutiny. Even that low constitutional threshold can-

not justify beating a deaf student for failure to follow spoken instructions, refusing to let the disabled on buses, excluding a paralyzed veteran from a public swimming pool, or denying a disabled student a college education either because "it would be 'disgusting' to [her] roommates to have to live with a woman with a disability," or because of groundless stereotypes that individuals with disabilities cannot teach, provide competent rehabilitation counseling, or succeed in a music course. See pages 25-26, 34-35 & nn.17-18, 26, 28, *supra*. "[M]ere negative attitudes, or fear" alone cannot justify disparate treatment of those with disabilities, *Garrett*, 531 U.S. at 367.

Moreover, a purported rational basis for treatment of the disabled will fail if the State does not accord the same treatment to other groups similarly situated, *Garrett*, 531 U.S. at 366 n.4; *Cleburne*, 473 U.S. at 447-450, if it is based on "animosity" towards the disabled, *Romer*, 517 U.S. at 634, or if it simply gives effect to private biases, *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984). It accordingly is not enough that the State can offer a rational basis—such as finances—for failing to offer benefit information or services in handicap-accessible formats if the State is already accommodating the special communication needs of other (*e.g.*, non-English speaking) constituents. Police may not refuse to take complaints from blind individuals (see page 30, *supra*), while taking them from victims who were blindfolded or unconscious. Moreover, many of the instances of discriminatory treatment reported to Congress arose in contexts, like education, institutionalization, and zoning, where state actors already make accommodations for other groups, but are selectively resistant to doing so for those with disabilities.

Third, and most importantly, the aggregate effect of consistently excluding individuals with disabilities from a broad range of important government services causes a constitutional problem that is greater than the sum of its parts. The

persistent "imposition of inequalities," on a single class, *Romer*, 517 U.S. at 633, and the chronic distribution of benefits and services, whether through legislation or executive action, in a way that "impos[es] special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish," *Plyler*, 457 U.S. at 217 n.14; see also *Lawrence* v. *Texas*, 123 S. Ct 2472, 2487 (2003) (O'Connor, J., concurring). Indeed, the combined effect of such governmental decisionmaking has denied individuals with disabilities the Constitution's most basic guarantees. An individual denied the ability to file a criminal complaint with the police, to participate at trial as a witness or juror, to petition the legislature or agencies to lift or modify exclusions, and to vote into office more responsive governmental officials, see pages 21-24, 27-30, *supra*, is denied those core rights that form the essence of democratic government, rights that others often take for granted. Thus Congress, in Title II, targeted not isolated and unrelated instances of unfair treatment, but an "across the board" pattern of governmental decisionmaking that time and again has left individuals with disabilities "exclu[ded] from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer*, 517 U.S. at 631, 633; see *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886).

5. Title II Is Constitutional In Its Entirety

Petitioner's State amici argue (Br. 7-11) that this Court should focus not on Title II's overall propriety as Section 5 legislation, but instead should independently analyze whether Congress's regulation of access to public buildings in Title II was appropriate. The legislative record provides an ample predicate for Congress's inclusion of public-access requirements in Title II. See Sections B(2)(b)(i), (iv), (v),

and (xiii); Appendix B. Beyond that, amici's piecemeal mode of analyzing Congress's exercise of its Section 5 power is fundamentally flawed.

First, amici's context-specific approach is not the model this Court has applied. In the past, this Court has analyzed whether Congress has the authority to apply to the States a statute as a whole, *Flores*, *supra*, a specific Title of a statute, *Garrett*, *supra*, or a specific Section of a statute, *South Carolina*, *supra*. But in no case has this Court required Congress to justify the application of an intentionally comprehensive statutory provision to every potential factual setting. In fact, the Court took a different tack in *City of Rome* v. *United States*, 446 U.S. 156 (1980), in upholding the application of voting preclearance requirements to cities where no discriminatory purpose underlay their adoption of an electoral system. *Id.* at 172; see also *Gaston County* v. *United States*, 395 U.S. 285 (1969). Likewise, this Court rejected in *Hibbs* the dissent's emphasis on Nevada's specific leave policies. Instead, the Court focused on the broader "backdrop of limited state leave policies," and found that "Congress was justified in enacting the [Family and Medical Leave Act] as remedial legislation," "no matter how generous" Nevada's own policies might have been. 123 S. Ct. at 1981.

Second, amici's approach is at odds with this Court's congruence and proportionality test for evaluating Section 5 legislation. Congruence and proportionality analysis necessarily entails looking at a statutory provision's overall operation and coverage, and measuring it against the predicate for congressional action as a whole. Where the necessary predicate for Section 5 legislation lies, Congress "must have wide latitude in determining" the proper means of enforcing the right. *Flores*, 521 U.S. at 519- 520; see generally *Hibbs*, *supra*; *South Carolina*, *supra*. Congress thus may legislate based on commonsense conclusions about the scope of a

problem and may enact prophylactic legislation designed to remedy the continuing effects of past discrimination, to root out difficult-to-detect discrimination and stereotyping, and to prevent the expansion of unconstitutional treatment into new areas.[29]

Thus, contrary to amici's argument, the congruence and proportionality test is not a license for judicial micromanagement of every potential application of a law. Title VII, 42 U.S.C. 2000e *et seq.*, for example, prohibits sex and race discrimination in the administration of any and all employment terms, conditions, and benefits; yet, this Court has never insisted that Congress justify its prohibitions application-by-application with a lengthy, documented record of particularized state discrimination. That is for the commonsense reason that discrimination, by its nature, does not operate in isolated compartments. The same mindset that has presumed that persons with disabilities cannot be educated, should not be parents, need not vote, and are too much trouble to transport, has also traditionally excluded individuals with disabilities from its conception of the community served by public programs and benefits. See *Hibbs*, 123 S. Ct. at 1980 n.5.[30]

---

[29] See *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.) (Congress's Section 5 power "include[s] the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations"); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding a nationwide ban on literacy tests and residency requirements despite the geographically limited evidence of abuse).

[30] Prior to the Court's adoption of the congruence and proportionality test in *Flores*, *supra*, the Court did rely upon an as-applied analysis to *sustain* the constitutionality of legislation enacted under Section 2 of the Fifteenth Amendment. See *United States* v. *Raines*, 362 U.S. 17, 21-26 (1960); cf. *Griffin* v. *Breckenridge*, 403 U.S. 88, 104-106 (1971) (sustaining the constitutionality of a law enacted under Section 2 of the Thirteenth Amendment both facially and as applied).

In that regard, amici's balkanized approach to Title II fundamentally misapprehends the nature and scope of the constitutional problem addressed by Congress. The legislative record before Congress revealed an interconnected pattern in the distribution of government services through which State actors continue to exclude and isolate individuals with disabilities, perpetuate false stereotypes, and persistently deny the disabled the same types of reasonable accommodations and adjustments that are routinely afforded other members of the public. Congress enacted a comprehensive and unitary remedy because it confronted a comprehensive and unitary problem. See *Hibbs*, 123 S. Ct. at 1981 ("Congress did not create a particular leave policy for its own sake," but rather addressed leave policy as part of a broader effort to "dismantle persisting gender-based barriers to the hiring, retention, and promotion of women in the workplace").

6. State Laws Provide Insufficient Protection

Petitioner and its amici argue (Pet. Br. 21-22; Ala. Br. 22-25) that the existence of state laws prohibiting some forms of disability discrimination made congressional action unnecessary. But, as the facts of this case well illustrate, that argument confuses the existence of laws with their effectiveness, and *Hibbs* made clear that effectiveness is what matters. 123 S. Ct. at 1980-1981 (addressing "important shortcomings" of laws cited by the dissenters). Congress specifically found that state laws were "inadequate to address the pervasive problems of discrimination that people with disabilities are facing." S. Rep. No. 116, *supra*, at 18; see also *ibid.* (section of report entitled "CURRENT FEDERAL AND STATE LAWS ARE INADEQUATE"); H.R. Rep. No. 485,

supra, Pt. 2, at 47 (same).[31] State officials themselves broadly agreed with that assessment. The 50 State Governors' Committees "report[ed] that existing State laws do not adequately counter * * * discrimination." S. Rep. No. 116, *supra*, at 18; H.R. Rep. No. 485, *supra*, Pt. 2, at 47; *Cal. Report* 22-23 (noting "contradictions" and "gaps" in state law). The Illinois Attorney General testified that "[p]eople with disabilities should not have to win these rights on a State-by-State basis," and that "[i]t is long past time * * * [for] a national policy that puts persons with disabilities on equal footing with other Americans." *May 1989 Hearings* 77.[32]

In addition, petitioner exaggerates the coverage of state laws. See generally J. Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help?*, 40 Ark. L. Rev. 261 (1986) (detailing gaps in coverage of state laws). Prior to 1990, nearly half of the States did not protect persons with mental illness and/or mental disabilities. See *id.* at 278-280. New Hampshire excluded disabilities caused by illness, N.H. Rev. Stat. Ann. § 354-A:3(XIII) (1984), while Arizona excluded disabilities which were first manifested after the age of 18, Ariz. Rev. Stat. § 36-551(11)(b) (1986). Flaccus, *supra*, at 285. Few States protected against discrimination based on either a perceived disability or a history of illness such as cancer. See B. Hoffman, *Employment Discrimination Based on Cancer History*, 1986 Temple L. Q. 1 (1986). Many States failed to provide for private rights of action and compensatory damages, effectively leaving vicims of discrimination without enforceable remedies. *Id.* at App. B; Flaccus, *supra*, at 300-310, 317-321.[33] Even today, less than half of the States provide statutory protection comparable to Title II. See R. Colker & A. Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075, 1076, 1083 (Summer 2002). In fact, petitioner's and amicus Wyoming's public accommodation laws do not cover discrimination in the provision of governmental services based on disability at all, and the laws of petitioner and four of its amici lack any enforcement mechanism against the State. *Id.* at 1093, 1102. Thus, just as state laws against gender discrimination have neither eradicated the problem nor undermined the basis for subjecting States to federal prohibitions, see *Hibbs*, 123 S. Ct. at 1978-1982, Congress was equally justified in concluding that state laws against disability discrimination had generally been ineffective in combating the lingering effects of prior official discrimination and exclusionary laws and policies and, more importantly, in changing the behavior of individual state actors.

---

[31] See 136 Cong. Rec. 11,455 (1990) (Rep. Wolpe), *id.* at 11,461 (Rep. Levine); 134 Cong. Rec. 9384-9385 (1988) (Sen. Simon); 2 *Leg. Hist.* 963, 967, 1642-1643; 3 *Leg. Hist.* 2245; AL 24; AK 52.

[32] See Dep't of Health & Human Servs., *Visions of: Independence, Productivity, Integration for People with Developmental Disabilities* 29 (1990) (19 States strongly recommended passage of the Disabilities Act); 2 *Leg. Hist.* 1050 (Mass. Rehab. Comm'n); *id.* at 1455-1456 (Treas., Harris Co., Tex.); *id.* at 1473-1474 (Chair, Metro. Transit Auth. of Harris Co., Tex.); *id.* at 1506 (Texas State Sen. Brooks); *id.* at 1508; *May 1989 Hearings* 778 (Ohio Governor).

[33] See *May 1989 Hearings* 386-394; 3 *Leg. Hist.* 2245; *Employment Discrim. Against Cancer Victims and the Handicapped: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. & Labor*, 99th Cong., 1st Sess. 62 (1985) (Rep. Moakley) ("[O]ne-fourth of the states have no protection for the handicapped. Additionally, even those states with laws differ greatly in their regulations.") (ten-state survey showing gaps in coverage of laws).

C. The Americans With Disabilities Act Of 1990 Is Reasonably Tailored To Remedying And Preventing Constitutional Violations

While Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified, *Florida Prepaid*, 527 U.S. at 639, "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies," *Flores*, 521 U.S. at 519-520. Thus, the relevant inquiry is not whether Title II "prohibit[s] a somewhat broader swath of conduct," *Garrett*, 531 U.S. at 365, than would the courts. "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence." *Ibid.* The question is whether, in light of the scope of the problem identified by Congress, the enactment "is so out of proportion to the supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Kimel*, 528 U.S. at 86. Title II is not.

1. Title II's Terms are Tailored To The Constitutional Problems It Remedies

Title II targets exclusively governmental action that is itself directly limited by the Constitution, rather than regulating public and private employment policies as a single, undifferentiated whole. Title II also focuses on discrimination that threatens fundamental rights or that is unreasonable. For those reasons, much of Title II's operation targets conduct outlawed by the Constitution itself. As applied to discrimination in voting, child custody proceedings, criminal cases, institutionalization, conditions of confinement, interactions with law enforcement, judicial proceedings, access to public officials and offices, and other areas implicating fundamental rights, Title II tracks the Fourteenth Amendment

when it prevents the disparate deprivation of those rights for invidious or insubstantial reasons. Furthermore, Title II targets discrimination that is unreasonable and, in so doing, ensures (as this Court did in *Cleburne*, 473 U.S. at 447-450), that the government's articulated rationale for differential treatment does not mask impermissible animus and does not result in the differential treatment of similarly situated groups. The States retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability or for no reason at all. The Disabilities Act does not require preferences and permits the denial of benefits or services if a person cannot "meet[] the essential eligibility requirements" of the governmental program or service. 42 U.S.C. 12131(2). But once an individual proves that he can meet all the essential eligibility requirements of a program or service, especially those programs and services that implicate fundamental rights, the government's interest in excluding that *qualified* individual solely "by reason of such disability," 42 U.S.C. 12132, is both minimal and, in light of history, constitutionally circumscribed. At the same time, permitting the States to retain and enforce their essential eligibility requirements protects their legitimate interests in structuring governmental activities. The Disabilities Act thus balances a State's legitimate operational interests against the right of a person with a disability to be judged "by his or her own merit and essential qualities." *Rice* v. *Cayetano*, 528 U.S. 495, 496 (2000).

As petitioner notes (Br. 31), the Disabilities Act requires "reasonable modifications" in public services. 42 U.S.C. 12131(2). But, as *Hibbs* makes clear, once Congress identifies a predicate of unconstitutional conduct that it seeks to remedy, Congress has flexibility in fashioning the remedy. See *Hibbs*, 123 S. Ct. at 1981 n.10, 1982-1984. The requirement of reasonable modifications, moreover, is precisely

tailored to the unique features of disability discrimination in two ways.

First, given the history of segregation and isolation and the entrenched stereotypes, fear, prejudices, and ignorance about persons with disabilities that it spawned, Congress reasonably determined that a simple ban on overt discrimination would be insufficient. It would do little to combat the "stereotypes [that have] created a self-fulfilling cycle of discrimination" against individuals with disabilities, and which, in turn, lead "to subtle discrimination that may be difficult to detect on a case-by-case basis." *Hibbs*, 123 S. Ct. at 1982. Given the record of discrimination against and unconstitutional treatment of the disabled, government's failure to make reasonable accommodations to the rigid enforcement of seemingly neutral criteria can often mask just such invidious, but difficult to prove, discrimination. Congress's Section 5 power includes the ability to ensure that constitutional violations are not left unremedied because of difficulties of proof. See, *e.g.*, *Hibbs*, 123 S. Ct. at 1982; *South Carolina*, 383 U.S. at 314-315.

In addition, a simple ban on discrimination would freeze in place the effects of States' prior official exclusion and isolation of individuals with disabilities, which had the effect of rendering the disabled invisible to government planners, thereby creating a self-perpetuating spiral of segregation, stigma, and neglect. See *Gaston County*, *supra* (constitutionally administered literacy test banned because it perpetuates the effects of past discrimination). By reducing stereotypes and misconceptions, integration reduces the likelihood that constitutional violations will recur. Cf. *Olmstead*, 527 U.S. at 600 (segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life").

Second, the Constitution itself already requires individualized consideration and modification of practices or programs, when necessary to avoid infringing on fundamental rights.[34] Beyond that, States may not justify infringement on fundamental rights by pointing to the administrative convenience or cost savings achieved by maintaining barriers to the enjoyment of those rights.[35] Title II, moreover, requires modifications only where "reasonable." 42 U.S.C. 12131(2). Governments need not make modifications that "impose an undue hardship" or require "fundamental alterations in the nature of a service, program, or activity," in light of their nature or cost, agency resources, and the operational practices and structure of the program. 42 U.S.C. 12111(10), 12112(b)(5)(A); 28 C.F.R. 35.130(b)(7), 35.150(a)(3), 35.164; *Olmstead*, 527 U.S. at 606 n.16 (plurality opinion). Furthermore, based on the consistent testimony of witnesses and expert studies, Congress determined that the vast majority of modifications entail little or no cost. One local government official stressed that "[t]his bill will not impose great hardships on our county governments" because "the majority of accommodations for employees with disabilities are less than $50" and "[t]he cost of making new or renovated structures accessible is less than 1 percent of the total cost of construction." 2 *Leg. Hist.* 1443 (Treasurer, Harris Co., Tex.).[36]

Title II thus goes further than the Constitution itself only to the extent that some disability discrimination in the realm

---

[34] See, *e.g.*, *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 121-122 (1996); *Stanley*, 405 U.S. at 651-658.

[35] See, *e.g.*, *Little* v. *Streater*, 452 U.S. 1, 13-17 (1981); *Memorial Hosp.* v. *Maricopa County*, 415 U.S. 250, 263 (1974); *Carrington* v. *Rash*, 380 U.S. 89, 95 (1965).

[36] See also S. Rep. No. 116, *supra*, at 10-12, 89, 92; H.R. Rep. No. 485, *supra*, Pt. 2, at 34; 2 *Leg. Hist.* 1552, 1077, 1388-1389, 1456-1457, 1560; 3 *Leg. Hist.* 2190-2191; *Task Force Report* 27; *Spectrum* 2, 30, 70; GAO, *Briefing Report on Costs of Accommodations, Americans with Disabilities Act: Hearing Before the House Comm. on Small Business*, 101st Cong., 2d Sess. 190 (1990).

of public services may have no impact on fundamental rights and may be rational for constitutional purposes, but still be unreasonable under the standards of the Disabilities Act. But that margin of statutory protection does not exceed Congress's authority. Like Title VII on which it was modeled, that level of statutory protection is necessary both to reach unconstitutional conduct that would otherwise escape detection in court and to deter future constitutional violations.

Furthermore, "[a] proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996). Section 5 thus empowers Congress to do more than simply prohibit the creation of new barriers to equality; it can require States to tear down the walls they erected during decades of discrimination and exclusion. See *id.* at 550 n.19 (Equal Protection Clause itself can require modification of facilities and programs to ensure equal access); see also *Hibbs*, 123 S. Ct. at 1981 n.10. Title II's accommodation requirements eliminate the effects of past discrimination by ensuring that persons previously invisible to program and building designers are now considered part of the government's service constituency. "Just as it is unthinkable to design a building with a bathroom only for use by men, it ought to be just as unacceptable to design a building that can only be used by able-bodied persons." 3 *Leg. Hist.* 1987 n.4 (Laura Cooper). That is because "[i]t is exclusive *designs*, and not any inevitable consequence of a disability that results in the isolation and segregation of persons with disabilities in our society." *Ibid.* In short, Title II is appropriate legislation because the remedy for segregation is integration, not inertia.[37]

2. Title II Is As Broad As Necessary

Lastly, petitioner objects (Br. 29-31) to the scope of Title II's coverage. But the operative question is not whether Title II is broad, but whether it is broader than necessary. It is not. Congress found that the history of unconstitutional treatment and the risk of future discrimination found by Congress pertain to all aspects of governmental operations. It determined that only a comprehensive effort to integrate persons with disabilities would end the cycle of isolation, segregation, and second-class citizenship, and deter further discrimination. Integration in education alone, for example, would not suffice if there were not going to be jobs and professional licenses for those who received the education. Integration in employment and licensing would not suffice if persons with disabilities lacked transportation. Integration in transportation is insufficient unless persons with disabilities can get into the facilities to which they are traveling. Ending unnecessary institutionalization is of little gain if neither government services nor the social activities of public life (libraries, museums, parks, and recreational services) are accessible to bring persons with disabilities into the life of the community. And none of those efforts would suffice if persons with disabilities continued to lack equivalent access to government officials, courthouses, and polling places.

In short, Congress chose a comprehensive remedy because it confronted an all-encompassing, inter-connected

---

[37] Likewise, child-size and adult-size water fountains routinely appear in buildings; requiring accessible fountains just expands that routine design process. 2 *Leg. Hist.* 993-994 (Jade Calegory) ("Black people had to use separate drinking fountains and those of us using wheelchairs cannot even reach some drinking fountains. We get thirsty, too.").

problem. To do less would be as ineffectual as "throwing an 11-foot rope to a drowning man 20 feet offshore and then proclaiming you are going more than halfway," S. Rep. No. 116, *supra*, at 13.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
R. ALEXANDER ACOSTA
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General
JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
KEVIN RUSSELL
Attorneys

NOVEMBER 2003

Supreme Court, U.S.
FILED
NOV 12 2003
OFFICE OF THE CLERK

No. 02-1667

In the Supreme Court of the United States

STATE OF TENNESSEE, PETITIONER

v.

GEORGE LANE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO THE BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
R. ALEXANDER ACOSTA
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General
JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
KEVIN RUSSELL
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

147 pp

TABLE OF CONTENTS

	Page
Appendix A (Cases Evidencing Unconstitutional Treatment of Individuals with Disabilities)	1a
Appendix B (Disabilities Act Enforcement Reports)	1b
Appendix C (Findings of Investigations Under the Civil Rights of Institutionalized Persons Act)	1c
Appendix D (Relevant Constitutional and Statutory Provisions)	1d

APPENDIX A

Cases Evidencing Unconstitutional Treatment of Individuals with Disabilities:

Foucha v. *Louisiana*, 504 U.S. 71 (1992) (Louisiana statute allowing continued confinement of the mentally ill, who were acquitted of crimes by reason of insanity, resulted in unconstitutional confinement, in violation of the Due Process Clause, where the hospital review committee had reported no evidence of mental illness and recommended conditional discharge); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985) (unconstitutional zoning discrimination); *Youngberg* v. *Romeo*, 457 U.S. 307, 315, 322 (1982) (institutionalized persons have due process "right to adequate food, shelter, clothing, and medical care," "safe conditions," and freedom from unreasonable physical restraint, as well as to "such training as may be reasonable in light of [the resident's] liberty interests in safety and freedom from unreasonable restraints"); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) (unconstitutional confinement); *Delano-Pyle* v. *Victoria County*, 302 F.3d 567, 575-576 (5th Cir. 2002) (affirming a jury verdict that included evidence of a police officer giving a sobriety test and *Miranda* warnings to a deaf plaintiff who could not understand him, and then arresting the plaintiff), cert. denied, No. 02-1223, 2003 WL 545392 (Oct. 6, 2003); *Kiman* v. *New Hampshire Dep't of Corrs.*, 301 F.3d 13, 15-16 (1st Cir. 2002) (disabled inmate stated Eighth Amendment claims for denial of accommodations needed to protect his health and safety due to his degenerative nerve disease), aff'd by an equally divided court, 332 F.3d 29 (2003) (en banc); *MX Group, Inc.* v. *City of Covington*, 293 F.3d 326, 345 (6th Cir. 2002) ("blanket prohibition of all metha-

done clinics from the entire city is discriminatory on its face"); *Popovich* v. *Cuyahoga County Ct. of Common Pleas*, 276 F.3d 808 (6th Cir.) (en banc) (deaf parent denied communication assistance in child custody proceeding), cert. denied, 537 U.S. 812 (2002); *Armstrong* v. *Davis*, 275 F.3d 849 (9th Cir. 2001) (failure to conduct parole and parole revocation proceedings in a manner that disabled inmates can understand and in which they can participate), cert. denied, 537 U.S. 812 (2002); *Baird* v. *Rose*, 192 F.3d 462 (4th Cir. 1999) (seventh-grader suffering from clinical depression prohibited from singing in school choir); *Key* v. *Grayson*, 179 F.3d 996 (6th Cir. 1999) (deaf inmate denied access to sex offender program required as precondition for parole), cert. denied, 528 U.S. 1120 (2000); *Bradley* v. *Puckett*, 157 F.3d 1022, 1025-1026 (5th Cir. 1998) (failure for several months to provide means for amputee inmate to bathe led to infection); *Gorman* v. *Easley*, 257 F.3d 738, 742 (8th Cir. 2001) (paraplegic arrested for trespass improperly restrained in non-wheelchair-accessible police van, causing his urine bag to burst, "soaking him with his own urine" and resulting in serious medical problems), judgment rev'd in part on grounds not relevant, 536 U.S. 181 (2002); *Layton* v. *Elder*, 143 F.3d 469, 470-472 (8th Cir. 1998) (mobility-impaired veterans' exclusion from a session of county quorum court and from courtroom due to their inability to access the second floor of the county courthouse); *Innovative Health Sys., Inc.* v. *City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997) (building permit denied for drug and alcohol treatment center "based on stereotypes and unsupported fears"); *Love* v. *Westville Corr. Ctr.*, 103 F.3d 558, 558, 560-561 (7th Cir. 1996) (quadriplegic inmate "was unable to participate in substance abuse, education, church, work, or transition pro-

grams available to members of the general inmate population" due to "intentional discrimination"); *Koehl* v. *Dalsheim*, 85 F.3d 86 (2d Cir. 1996) (Eighth Amendment violated when inmate with serious vision problem denied glasses and treatment); *Weeks* v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) ("squalor in which [prisoner] was forced to live as a result of being denied a wheelchair" violated the Eighth Amendment); *Thomas S.* v. *Flaherty*, 902 F.2d 250 (4th Cir.) (unconstitutional confinement when appropriate community placement available), cert. denied, 498 U.S. 951 (1990); *Leach* v. *Shelby County Sheriff*, 891 F.2d 1241, 1243-1244 (6th Cir. 1989) (finding a policy or custom of deliberate indifference to serious medical needs of paraplegic inmates; evidence showed that, "[d]espite his medical need for cleanliness, [an inmate] was not bathed for several days," "was forced to remain for long periods of time in his own urine due to inadequate catheter supplies and was given inadequate aid for his bowel training needs despite his repeated requests for help"), cert. denied, 495 U.S. 932 (1990); *Chalk* v. *United States Dist. Ct. Cent. Dist. of Cal.*, 840 F.2d 701 (9th Cir. 1988) (certified teacher barred from teaching after diagnosis of AIDS); *LaFaut* v. *Smith*, 834 F.2d 389 (4th Cir. 1987) (Powell, J.) (failure to provide paraplegic inmate with an accessible toilet is cruel and unusual punishment); *Parrish* v. *Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986) (prison guard repeatedly assaulted paraplegic inmates with a knife, forced them to sit in their own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead"); *Clark* v. *Cohen*, 794 F.2d 79 (3d Cir.) (unconstitutional confinement), cert. denied, 479 U.S. 962 (1986); *Miranda* v. *Munoz*, 770 F.2d 255, 259 (1st Cir. 1985) (failure to provide medications for epilepsy, which caused prisoner's death,

violated Eighth Amendment); *Lynch* v. *Baxley*, 744 F.2d 1452 (11th Cir. 1984) (State subjected individuals awaiting civil commitment proceedings to unconstitutional conditions of confinement in county jails); *Pomerantz* v. *Los Angeles County*, 674 F.2d 1288, 1289 (9th Cir. 1982) ("undisputed facts show that the Los Angeles County Jury Commissioner, and other employees directly involved in the jury selection process for the Superior Court for the County of Los Angeles had, prior to January 1, 1978, excluded all blind persons from jury service solely because they were blind"); *Pushkin* v. *Regents of Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981) (doctor with multiple sclerosis unconstitutionally denied residency out of concern about patients' reactions); *Ferrell* v. *Estelle*, 568 F.2d 1128, 1133 (5th Cir.) (deaf habeas petitioner's "rights were reduced below the constitutional minimum" because he could not understand his trial), withdrawn due to death of petitioner, 573 F.2d 867 (1978); *Gurmankin* v. *Costanzo*, 556 F.2d 184 (3d Cir. 1977) (holding unconstitutional an irrebuttable presumption that blind teacher cannot instruct sighted students); *Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (unconstitutional conditions of confinement for the mentally ill); *Pathways Psychosocial* v. *Town of Leonardtown*, 133 F. Supp. 2d 772, 791-792 (D. Md. 2001) (denying summary judgment for defendants on claim that town officials violated Equal Protection Clause through zoning decisions that excluded a home for individuals with mental retardation), after judgment, 223 F. Supp. 2d 699, 704-705 (2002) (jury found constitutional violation, and motion for new trial was denied); *McCray* v. *City of Dothan*, 169 F. Supp. 2d 1260, 1279-1280 (M.D. Ala. 2001) (police officer had "not articulated *any* specific facts upon which suspicion reasonably could be founded" other than "the communication gap between a deaf man and herself"), aff'd in part & rev'd in part, No. 01-15756, 2003 WL 21067092 (11th Cir. Apr. 24, 2003) (Table); *M.H.* v. *Bristol Bd. of Educ.*, 169 F. Supp. 2d 21, 24-25 (D. Conn. 2001) (possible substantive due process violation where school employees spat water in disabled student's face and restrained him so forcibly as to result in bruising); *Doe* v. *Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001) (unconstitutional restriction on voting by those with mental disabilities); *Project Life, Inc.* v. *Glendening*, 139 F. Supp. 2d 703, 705 (D. Md. 2001) (unlawful rejection of permit for drug treatment facility based on "community prejudices"), aff'd, No. 01-1754, 2002 WL 2012545 (4th Cir. Sept. 4, 2002); *Salcido ex rel. Gilliland* v. *Woodbury County*, 119 F. Supp. 2d 900, 931 (N.D. Iowa 2000) (granting summary judgment for mentally ill plaintiff on claim that he was denied due process by State's denial of an appropriate institutional placement without notice or hearing); *New York* v. *County of Schoharie*, 82 F. Supp. 2d 19 (N.D.N.Y. 2000) (inaccessible polling places); *New York* v. *County of Delaware*, 82 F. Supp. 2d 12 (N.D.N.Y. 2000) (inaccessible polling places); *Schmidt* v. *Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999) (amputee forced to crawl around jail, resulting in injury and infection, in violation of Eighth Amendment); *Matthews* v. *Jefferson*, 29 F. Supp. 2d 525 (W.D. Ark. 1998) (paraplegic litigant had to be carried up stairs to court room for all-day hearing at which he could not leave to get food or use the restroom to empty catheter, resulting in infection; eventually had to crawl down steps to get out after everyone left the courthouse without him); *Hanson* v. *Sangamon County Sheriff's Dep't*, 991 F. Supp. 1059, 1061-1062 (C.D. Ill. 1998) (possible constitutional violation where deaf arrestee was denied the opportunity to post bond and make a telephone call because

the police department failed to provide, despite his requests, alternatives to the conventional telephone, and that denial resulted in much longer detention than other, similarly situated arrestees); *Lewis* v. *Truitt*, 960 F. Supp. 175 (S.D. Ind. 1997) (Fourth Amendment prohibits use of force against an individual, whom officers know to be deaf, for not complying with officers' spoken commands); *Carty* v. *Farrelly*, 957 F. Supp. 727, 739 (D.V.I. 1997) ("The abominable treatment of the mentally ill inmates shows overwhelmingly that defendants subject inmates to dehumanizing conditions punishable under the Eighth Amendment."); *Kaufman* v. *Carter*, 952 F. Supp. 520 (W.D. Mich. 1996) (amputee hospitalized after fall in inaccessible jail shower); *Bullock* v. *Gomez*, 929 F. Supp. 1299, 1301, 1307 (C.D. Cal. 1996) (possible constitutional violation where California Department of Corrections' family visiting program precluded HIV-positive inmates from having the same overnight visits with spouses afforded other inmates, even where spouse was also HIV positive and incapable of bearing children); *Clarkson* v. *Coughlin*, 898 F. Supp. 1019, 1049 (S.D.N.Y. 1995) (holding, *inter alia*, that state prison officials' failure to provide interpreters or other assistive services to deaf and hearing impaired inmates during medical treatment violated the Eighth Amendment, as at least two such inmates experienced improper and possibly harmful treatment through provision of medical treatment in absence of qualified interpreters); *Stillwell* v. *Kansas City, Mo. Bd. of Police Comm'rs*, 872 F. Supp. 682, 688 (W.D. Mo. 1995) (holding that the Board of Police Commissioners' licensing scheme violates the Due Process Clause of the Fourteenth Amendment because it irrebuttably presumes that an individual with only one hand is unqualified for the position of armed security guard); *Harrelson* v.

Elmore County, 859 F. Supp. 1465, 1466 (M.D. Ala. 1994) (paraplegic prisoner denied use of a wheelchair and forced to crawl around his cell); *Eric L.* v. *Bird*, 848 F. Supp. 303, 306, 308 (D.N.H. 1994) (possible constitutional violation where children with disabilities in foster care alleged that the State failed "to take the required measures to maintain the integrity of plaintiffs' families where possible, to reunite removed children with their families as soon as possible, or to place them in secure, permanent homes within an appropriate time and in an appropriate manner," as well as failed "to provide services necessary to protect children in the class from harm"); *T.E.P.* v. *Leavitt*, 840 F. Supp. 110 (D. Utah 1993) (statute prohibiting and voiding marriages between individuals with AIDS); *Noland* v. *Wheatley*, 835 F. Supp. 476, 480-482 (N.D. Ind. 1993) (possible constitutional violation where semi-quadriplegic inmate confined to a wheelchair was confined to secluded padded cell for months, denied sufficient water to maintain kidney functioning or to permit sanitary handling of colostomy and urostomy bag, forcing him to "eat many meals with the human waste still on his hands," and was unable to sleep in bed because his wheelchair could not fit through the doorway, all resulting in adverse medical conditions); *Casey* v. *Lewis*, 834 F. Supp. 1569, 1582-1583 (D. Ariz. 1993) (holding that prison's failure to provide accessible bathrooms, showers, and cells to mobility-impaired inmates, as well as a consistent pattern of delays in prisoner receipt of hearing aids, violated the Eighth Amendment); *Galloway* v. *Superior Court*, 816 F. Supp. 12 (D.D.C. 1993) (blind individuals categorically excluded from jury service); *United States* v. *Borough of Audubon*, 797 F. Supp. 353, 360 (D.N.J. 1991) (predominant motivation underlying city's efforts to exclude group home

for the handicapped "was discriminatory animus"), aff'd, 968 F.2d 14 (3d Cir. 1992) (Table); *Nolley* v. *County of Erie*, 776 F. Supp. 715 (W.D.N.Y. 1991) (Constitution violated where inmate with HIV was housed in the part of a prison reserved for inmates who are mentally disturbed, suicidal, or a danger to themselves, and was denied access to prison library and religious services); *Kroll* v. *St. Charles County*, 766 F. Supp. 744, 744-751 (E.D. Mo. 1991) (courthouse and government buildings broadly inaccessible to individuals with mobility impairments); *Bonner* v. *Arizona Dep't of Corrs.*, 714 F. Supp. 420 (D. Az. 1989) (deaf, mute, and vision-impaired inmate denied communication assistance, including during disciplinary proceedings, counseling sessions, and medical treatment); *DeLong* v. *Brumbaugh*, 703 F. Supp. 399, 405 (W.D. Pa. 1989) (decision to exclude deaf individual from jury was "unreasonable, discriminatory and violative of Section 504 of the Rehabilitation Act"); *Doe* v. *Dolton Elem. Sch. Dist.*, 694 F. Supp. 440 (N.D. Ill. 1988) (elementary student with AIDS excluded from attending regular classes or extracurricular activities); *Robertson* v. *Granite City Comm. Unit Sch. Dist.*, 684 F. Supp. 1002 (S.D. Ill. 1988) (seven-year old student with AIDS confined to a modular classroom where he was the only student); *Thomas* v. *Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1986) (kindergarten student with AIDS excluded from class and forced to take home tutoring); *Thompson* v. *City of Portland*, 620 F. Supp. 482, 485-487 (D. Me. 1985) (police violated the constitutional rights of a blind diabetic who was in insulin shock by arresting him, transporting him on floor of police cruiser, jailing him, and ignoring his explanation that he was in insulin shock, despite fact that he wore a Medic-Alert necklace and carried a white cane); *Ass'n for*

Retarded Citizens of N.D. v. *Olson*, 561 F. Supp. 473, 491-492 (D.N.D. 1982) (finding violations of mentally retarded residents' constitutional rights to privacy, private property, and free association, as (1) many of the mentally retarded residents "are left fully naked in front of each other and assistants and such residents are not provided places where they can be in private" and "are denied the opportunity to decide for themselves how to dress"; (2) the State did not "adequately provide for an accounting of [each] resident's personal property and for a safe place of storage"; and (3) the State did not "provide residents who are capable of communicating, reasonable opportunities to communicate with others both inside and outside the institution where they reside"), aff'd, 713 F.2d 1384 (8th Cir. 1983); *Garrity* v. *Gallen*, 522 F. Supp. 171, 214 (D.N.H. 1981) ("blanket discrimination against the handicapped * * * is unfortunately firmly rooted in the history of our country"); *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, 466 F. Supp. 487 (E.D.N.Y. 1979) (mentally retarded students excluded from public school system); *Hairston* v. *Drosnick*, 423 F. Supp. 180 (S.D. W. Va. 1976) (school refused to admit child with spina bifida without the daily presence of her mother, even though student was of normal mental competence and capable of performing easily in a classroom situation); *Smith* v. *Fletcher*, 393 F. Supp. 1366, 1368 (S.D. Tex. 1975) (government assigned paraplegic, who had a Master's degree in physiology, to menial clerical tasks based on "arbitrary and unfounded decision as to her physical capabilities"), aff'd as modified, 559 F.2d 1014 (5th Cir. 1977); *Mills* v. *Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (mentally retarded students excluded from public school system); *Pennsylvania Ass'n for Retarded Children* v. *Commonwealth*, 334 F. Supp.

1257 (E.D. Pa. 1971) (mentally retarded students excluded from public school system); *Daly* v. *DelPonte*, 624 A.2d 876, 880, 885 (Conn. 1993) (holding that the commissioner's exercise of his "statutory authority to condition a motor vehicle operator's license on the licensee's reporting his or her medical status" violated the state constitution's equal protection provision because the record "contained no evidence that th[e] reporting requirement was narrowly tailored either to the plaintiff's condition at the time of its issuance or to his probable future condition for the designated time period"); *State* v. *Schaim*, 600 N.E.2d 661, 672 (Ohio 1992) (under the Confrontation Clause, "[a] defendant who cannot hear is analogous to a defendant who cannot understand English, and a severely hearing-impaired defendant cannot be tried without adopting reasonable measures to accommodate his or her disability"); *Moye* v. *Moye*, 627 P.2d 799, 801 (Idaho 1981) (holding that, while a parent's physical condition is a valid consideration in the "best interests" approach to determining the issue of a child's custody, the trial court's overemphasis on the mother's epilepsy rendered the custody award to the father an abuse of discretion); *State* v. *Staples*, 437 A.2d 266, 268 (N.H. 1981) (ineffective assistance of counsel in failing to secure assistance for hearing-impaired defendant whose disability made him "unable to assist effectively in the preparation of his defense"); *In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979) (lower court "stereotype[d] William as a person deemed forever unable to be a good parent simply because he is physically handicapped"); *Connecticut Inst. for the Blind* v. *Connecticut Comm'n on Human Rights & Opps.*, 405 A.2d 618, 621 (Conn. 1978) (blanket exclusion from state jobs of persons with visual impairments); *State* v. *Board of Educ.*, 172 N.W. 153, 153

(Wis. 1919) (excluding a boy with cerebral palsy from public school because he "produces a depressing and nauseating effect upon the teachers and school children"); *State* v. *Barber*, 617 So. 2d 974, 976 (La. Ct. App. 1993) ("[T]he Constitution requires that a defendant sufficiently understand the proceedings against him to be able to assist in his own defense. Clearly, a defendant who has a severe hearing impairment, without an interpreter, cannot understand the testimony of witnesses against him so as to be able to assist in his own defense."); *People* v. *Green*, 561 N.Y.S.2d 130, 133 (County Ct. 1990) (holding that prosecutor's peremptorily striking a juror solely because she was hearing impaired, and not because of any doubt of the juror's ability to communicate, violated the juror's right to equal protection); *Stewart* v. *Stewart*, 521 N.E.2d 956, 965-966 (Ind. Ct. App. 1988) (holding that father's visitation rights were improperly terminated because of evidence that he was infected with the AIDS virus); *Peeler* v. *State*, 750 S.W.2d 687, 690-691 (Mo. Ct. App. 1988) (constitutionally ineffective assistance of counsel in failure to request an interpreter, where the hearing-impaired defendant was "probably unable to understand what was being said at trial"); *District 27 Comm. Sch. Bd.* v. *Board of Educ.*, 502 N.Y.S.2d 325 (Sup. Ct. 1986) (two school boards sought to prevent attendance of any student with AIDS in any school in the city, unless all of the students at that school had AIDS); *Bednarski* v. *Bednarski*, 366 N.W.2d 69, 73 (Mich. Ct. App. 1985) (holding that a mother's deafness was inappropriately weighed against her in a custody dispute over her two minor children); *People* v. *Rivera*, 480 N.Y.S.2d 426, 434 (Sup. Ct. 1984) (conviction was unconstitutionally obtained because the deaf defendant had no interpreter and did not understand his trial); *In re*

Marriage of Paula R., 102 Cal. App. 3d 981, 988-989 (Ct. App. 1980) (reversing the trial court's award of permanent custody of child to father because mother was confined to a wheelchair, as the trial court did not use the proper standard in determining who should receive custody: "whether the handicapped parent's condition will in fact have a substantial and lasting adverse effect on the best interests of the child"); *Bevan* v. *New York State Teachers' Retirement Sys.*, 345 N.Y.S.2d 921 (Sup. Ct. 1973) (statute allowing forced retirement of teacher who became blind), modified, 355 N.Y.S.2d 185 (App. Div. 1974); *In re Adoption of Richardson*, 251 Cal. App. 2d 222, 239 (1967) (trial court "stated, in effect, he will systematically strike any and all deaf-mute petitioners from any list of prospective adopting parents"); *Commonwealth* v. *Smith*, 119 A.2d 620, 622 (Pa. Super. Ct. 1956) (holding that the fact that a father suing for custody of his son suffers from epilepsy is a factor that should be considered in determining whether to award custody).

APPENDIX B

The Justice Department publishes quarterly status reports, which include information from a sampling of the Department's Disabilities Act enforcement efforts under 42 U.S.C. 12133. The status reports can be found at http://www.ada.gov/enforce. htm. The 34 reports published to date list 110 matters concerning courthouse accessibility or effective access to judicial proceedings. The following is a list of those matters. One case (against the State of Massachusetts alleging problems with physical accessibility) resulted in a lawsuit (that remains pending), which was reported in the January 2003 status report. The Table includes the jurisdiction in which the courthouses are located, the type of problem reported by persons with disabilities, and the date of the status report in which the matter appears. There are 50 cases that resulted in formal settlement agreements, 51 cases that resulted in informal settlement agreements, and 8 cases that resulted in formal mediation. In cases resulting in informal settlements or mediation, the Justice Department does not identify the covered jurisdiction by name:

Complaints Resulting In Formal Settlement Agreements:

Jurisdiction	*Type of Problem*	*Status Report*
Lucas County, OH	physical access	Jan. - Mar. 2003
Guernsey County, OH	physical access	Oct. - Dec. 2002
Essex County, NJ	physical access	Oct. - Dec. 2002
Windsor County, VT	lack of sign language interpreter	Oct. - Dec. 2002
Warren, OH	physical access	Apr. - June 2002
Ben Hill County, GA	physical access	Apr. - June 2001
Gulfport, MS	lack of sign language interpreter	Apr. - June 2000

Shelby County, TN	lack of assistive listening devices	Apr. - June 2000
Adair County, OK	physical access	Jan. - Mar. 2000
Houston, TX	lack of assistive listening devices	Jan. - Mar. 2000
Toledo, OH	physical access and lack of communication assistance	July - Sep. 1999
Lake County, IL	lack of sign language interpreter	July - Sep. 1999
Oklahoma County, OK	physical access and lack of communication assistance	Apr. - June 1999
Georgiana, AL	physical access	Apr. - June 1999
State of Hawaii	lack of sign language interpreter and assistive listening devices	Oct. - Dec. 1998
McDowell County, WV	physical access	July - Sep. 1998
Mendocino County, CA	physical access	July - Sep. 1998
Johnson County, TN	physical access	July - Sep. 1998
Citrus County, FL	physical access	Apr. - June 1998
Chico County, AR	physical access	Jan. - Mar. 1998
Dickinson, ND	physical access	Jan. - Mar. 1998
Wetzel County, WV	physical access	Jan. - Mar. 1998
Twin Falls, ID	lack of sign language interpreter and communication assistance	Oct. - Dec. 1997
Philadelphia, PA	lack of procedures for jurors to request accommodations	Oct. - Dec. 1997

Boone County, IN	lack of assistive listening devices	July - Sep. 1997
Grand Rapids, MI	lack of assistive listening devices	July - Sep. 1997
Outagamie County, WI	physical access and lack of assistive listening devices	Apr. - June 1997
Rome, NY	physical access	Jan. - Mar. 1997
Hancock County, MS	assistive listening (deaf individual excluded from jury service)	Jan. - Mar. 1997
Harrison County, MS	assistive listening (deaf individual excluded from jury service)	Jan. - Mar. 1997
Roswell, NM	lack of assistive listening devices	Jan. - Mar. 1997
Santa Clara County, CA	lack of assistive listening devices	Oct. - Dec. 1996
Jones County, CA	physical access	Oct. - Dec. 1996
Town of Lloyd, NY	lack of communication assistance	July - Sep. 1996
Tallahassee, FL	lack of communication assistance	Apr. - June 1996
Pickens County, SC	lack of assistive listening devices	Oct. - Dec. 1994
Fulton, MO	lack of communication assistance	Apr. - June 1994
Wadsworth, OH	physical access	Apr. - June 1994

Alexandria, LA	lack of communication assistance and sign language interpreter	Apr. - June 1994
Genesee County, MI	physical access	Apr. - June 1994
Hickman County, KY	physical access	April 1994
Van Buren County, AR	physical access	April 1994
Harris County, TX	physical access and lack of communication assistance	April 1994
Scott County, AR	physical access	April 1994
Madison County, FL	physical access	April 1994
Pinellas County, FL	lack of communication assistance	April 1994
Salt Lake City, UT	lack of communication assistance (deaf individual excluded from jury)	April 1994
Paulding County, OH	physical access	April 1994

Complaints Resulting In Informal Settlement Agreements:

Jurisdiction	*Type of Problem*	*Status Report*
county in Ohio	lack of sign language interpreter	Jan. - Mar. 2003
unnamed jurisdiction	lack of assistive listening devices	Jan. - Mar. 2003
county in Mississippi	lack of sign language interpreter	Jan. - Mar. 2003
county in Illinois	lack of sign language interpreter	Oct. - Dec. 2002
county in Louisiana	lack of sign language interpreter	July - Sep. 2002

county in Pennsylvania	lack of accessible parking	Apr. - June 2002
county in Arizona	physical access	Apr. - June 2002
county in Nebraska	physical access	Jan. - Mar. 2002
New England state court system	lack of sign language interpreter and assistive listening devices	Jan. - Mar. 2002
county in Arizona	lack of assistive listening devices	Oct. - Dec. 2001
county in Texas	lack of sign language interpreter	July - Sep. 2001
county in California	physical access	July - Sep. 2001
Iowa court	lack of sign language interpreter	July - Sep. 2001
county in Texas	physical access	Oct. - Dec. 1999
county in Oklahoma	physical access	Oct. - Dec. 1999
county in Pennsylvania	physical access	Oct. - Dec. 1999
county in Texas	lack of assistive listening devices	July - Sep. 1999
county in Colorado	lack of accessible parking	July - Sep. 1999
Michigan court	lack of communication assistance	July - Sep. 1999
city in Pennsylvania	physical access	July - Sep. 1999
town in Ohio	physical access	Oct. - Dec. 1998
county in Michigan	physical access	Oct. - Dec. 1998
Louisiana parish	physical access	Apr. - June 1998
county in Michigan	physical access	Apr. - June 1998
county in Illinois	lack of communication assistance	Jan. - Mar. 1998
county in Michigan	lack of assistive listening devices	Oct. - Dec. 1997

county in Arizona	lack of communication aids	Oct. - Dec. 1997
county in Florida	physical access	July - Sep. 1997
Tennessee circuit court	lack of communication aids	July - Sep. 1997
county in California	lack of assistive listening devices	Apr. - June 1997
county in Michigan	lack of auxiliary aids	Jan. - Mar. 1997
supreme court of a "southern state"	lack of auxiliary aids	Jan. - Mar. 1997
Colorado judicial district	lack of auxiliary aids	Jan. - Mar. 1997
county in Wyoming	physical access	Jan. - Mar. 1997
county in Michigan	physical access	Oct. - Dec. 1996
county in Virginia	lack of auxiliary aids	Oct. - Dec. 1996
city in California	lack of auxiliary aids	July - Sep. 1996
county in West Virginia	physical access	July - Sep. 1996
county in Washington	lack of visual communication assistance	Apr. - June 1996
county in California	lack of accessible parking	Apr. - June 1996
county in Pennsylvania	physical access	Jan. - Mar. 1995
"western state court"	lack of assistive listening devices	Oct. - Dec. 1994
Ohio court	lack of communication assistance	Oct. - Dec. 1994
county in Kentucky	physical access	July - Sep. 1994
county in Colorado	physical access	July - Sep. 1994
county in Colorado	physical access	Apr. - June 1994

county in Missouri	physical access	April 1994
"various cities and towns in East and Midwest"	physical access	April 1994
county in Washington	physical access	April 1994
Michigan court	lack of assistive listening devices	April 1994
Pennsylvania county court	lack of accommodation for person with learning disability	April 1994

Complaints Resulting In Mediation:

Jurisdiction	*Type of Problem*	*Status Report*
county in Illinois	physical access	Oct. - Dec. 2002
county in Arkansas	physical access	Oct. - Dec. 2001
town in New York	physical access	Oct. - Dec. 2001
county in South Carolina	lack of sign language interpreter	July - Sep. 2001
county in California	physical access	Apr. - June 2001
county in Tennessee	physical access	Jan. - Mar. 2000
county in Nebraska	physical access	Jan. - Mar. 2000
Michigan court	lack of sign language interpreter	July - Sep. 1997

In addition to the settlement agreements reported in the published status reports, there are several additional formal settlement agreements entered into between the Justice Department and various jurisdictions in cases dealing with courthouses. Although they are not reported in the status reports, they are available on the website: http://www.ada.gov

Jurisdiction	*Problem*	*Date of Agreement*
Summers County, WV	physical access and lack of assistive listening devices	5/11/00
Craig County, VA	physical access	1/30/02
Allendale County, SC	physical access	8/13/01
Butte County, SD	physical access	7/31/01
Boulder County, CO	physical access	10/2/00
Warren County, IL	physical access	9/6/01
Perry County, KY	physical access	9/25/01
City of Cambridge, OH	physical access	11/1/01
City of San Antonio, TX	physical access	1/30/02
City of Savannah, GA	physical access	1/30/02
City of Bismarck, ND	physical access	10/16/02
Columbia County, NY	physical access	5/19/03
Loudon County, TN	physical access and lack of assistive listening devices	7/25/03
Madison County, MS	physical access	7/25/03
Worcester County, MD	physical access	7/28/03

APPENDIX C

Findings of Investigations Under the Civil Rights Of Institutionalized Persons Act 42 U.S.C. 1997 et seq.

Between 1980 and the enactment of Title II of the Americans with Disabilities Act in 1990, Department of Justice investigations under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, found unconstitutional treatment of individuals with disabilities in institutions in more than twenty-five States. From 1980 until the present, unconstitutional conditions have been found in more than 200 institutions in more than thirty States throughout the Country. The Tables below describe some of the findings issued by the Department of Justice pursuant to 42 U.S.C. 1997b(a)(1). Copies of the complete findings letters will be provided to the Court upon request, and have been served upon counsel for the petitioner and the private respondents.

I. Investigations Prior to Enactment of the Americans with Disabilities Act

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Rosewood Center	MD	1982	Failure to provide reasonable supervision and safety	Many residents sustained injuries during "low staffing periods" (p. 4). One resident left the facility unobserved and died of exposure. A profoundly retarded resident drowned when staff left him unattended in a bathtub. Another died after being pushed down a flight of stairs (pp. 4-5). On another occasion, "six severely handicapped female residents * * * were allegedly raped by an outside intruder. There was only one staff person on duty to supervise the 32 residents * * * and only one security officer on duty to cover the entire Rosewood facility. While the inability of the residents to communicate apparently prevented state officials from confirming the rapes * * * several of the residents had positive tests for gonorrhea of the throat right after the incident" (p. 4). Several male patients "show[ed] the presence of venereal disease" and "nonconsensual sexual contact occurred between one resident and at least one and possibly three residents" (p. 4).
			Abuse of residents	An employee sexually abused a resident (p. 4).
			Unsanitary conditions	Facilities are deteriorating; the "stench of urine is prevalent in a number of buildings." Plumbing problems left overflowing toilets unrepaired for days; heating problems subjected patients to "sub-freezing temperature in the buildings themselves" at times (p. 5).
			Inadequate training	"Over 900 of the 1125 residents receive less than 50% of the services

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				called for in their program plans" (p. 2).
East Louisiana State Hospital	LA	1982	Inadequate medical and mental health care	pp. 2-4
Enid & Paul's Valley State Schools	OK	1983	Inadequate medical and mental health care	"Insufficient licensed physician coverage has resulted in serious harms to residents," contributing to patient deaths (p. 2-3).
			Inadequate training	Lack of training "contributes to and manifests itself in residents' aggressive and stereotypic behaviors * * * [such as] incessant disordered physical movements, headbanging, biting, hyperactivity, and assaultive behavior" (p. 5).
			Failure to provide reasonable supervision and safety	"For example, a group of 21 naked residents were observed being led to a shower area, where two staff sprayed the residents down with a large garden type hose" (p. 5).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Unreasonable use of physical and chemical restraints	p. 5
			Abuse of residents	Staff found "slapping, kicking, hitting, or spanking residents" while records also "reflect many instances of unexplained resident injuries" (p. 6).
			Unsanitary conditions	Lack of sanitation practices contributed to parasitic and bacterial infections requiring quarantine of entire living areas (p. 6).
Wheat Ridge Regional Center	CO	1984	Failure to provide reasonable supervision and safety	"Due to lack of staff, residents suffer neglect and numerous accidents and injuries. * * * [N]umerous residents have sustained injuries where the cause remains unknown. Resident on resident assaults are common; residents engaging in self-abusive behaviors are frequently unsupervised and unattended. Residents have been

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				found with unexplained broken bones and burns to the body. For example, one resident was found with a femur segment protruding through the skin" (p. 2). During tour, staff came upon "approximately 20 adult women being cared for by one person amid great disorder and confusion. Many of these women were partially undressed, one was urinating on the floor of the living area and several were engaging in self-abusive behavior" (p. 2).
			Inadequate medical and mental health care	"A large number of Wheat Ridge residents suffer from severe contractures of their limbs and other body deformities due to the absence of necessary physical and occupational therapy" (p. 3). "One troublesome secondary effect of these immobilizing contractures due to lack of physical

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				therapy is the dysfunctioning of the digestive system," which has apparently caused an "abnormally high percentage of Wheat Ridge residents to require pureed diets or gastroatomies for tube feeding" (p. 4).
Logansport State Hospital	IN	1984	Inadequate medical and mental health care	pp. 1-2
			Failure to provide reasonable supervision and safety	"Patients are not being adequately monitored and supervised to prevent suicidal behavior or patient-on-patient violence, to notice and correctly diagnose symptoms of serious, physical or psychiatric dysfunctions, to monitor treatment responses and drug reactions, or to determine appropriate and reasonably safe modes of treatment for each patient" (pp. 2-3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Manteno and Eglin Mental Health Centers	IL	1984	Inadequate medical and mental health care; Inadequate training; Unreasonable use of physical restraints	Lack of professional staff lead to "inappropriate uses of drugs and serious treatment errors which have resulted in physical danger to, or unnecessary physical or chemical restraint of, the involved patients" (p. 3). Patients are further "endangered by inadequate medical care relating to serious and sometimes debilitating or life-threatening drug side-effects" (p. 4).
			Failure to provide reasonable supervision and safety	"Units in the facilities are overcrowded to a point that makes it virtually impossible for staff to maintain control without regular and extensive use of physical and chemical restraints" (p. 4).
			Unsanitary conditions	"Sanitation and maintenance in portions of the facilities are so inadequate as to present serious risks to patients of poisoning,

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				infection, or disease" (pp. 4-5).
Northville Regional Psychiatric Hospital	MI	1984	Failure to provide reasonable supervision and safety; Abuse of residents	Large number of patient deaths under unusual circumstances, some associated with restraint practices (p. 3). A patient died after "a stranglehold was applied to him while he was being subdued. He reportedly lay on the seclusion room floor from 15-20 minutes before efforts were made to resuscitate him" (pp. 2-3). "Another patient also died due to strangulation, and his body showed signs of a beating" (p. 3). "A third patient allegedly died from injuries suffered in a beating. Still another patient, who had expressed her fear for her safety to her psychologist on a Friday, died over the weekend. Her body allegedly was bruised and battered" (p. 3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Police found that another patient who had died in a seclusion cell "had contusions on his face and the back of his head" (p. 3). There have also been "numerous incidents of rape, assault and threat of assault, broken bones and bruises" (p. 3). A staff member was found to have had "sexual relations with three different patients in one night." Other patients were beaten by staff, "including one who was stripped, placed in seclusion and severely beaten by several attendants" (p. 3).
			Inadequate medical and mental health care	Inadequate medical care contributed to several deaths and preventable suicides (pp. 3-4).
Fairview Training Center	OR	1985	Inadequate training	Training "is virtually non-existent" and "results in a serious level of self-injurious and aggressive behaviors" (p. 3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Unreasonable use of physical and chemical restraints	"[R]estraints are used at Fairview in lieu of training and for the convenience of staff," and were employed more than 2,000 times per month (p. 4).
			Failure to provide reasonable supervision and safety	Records showed "an alarmingly high number of injuries," such as 197 incidents of injuries in one month resulting from self-abuse or aggression. In one two-month period, there were 27 incidents of sexual abuse (p. 3 n.1). "[W]e observed numerous residents with open wounds, gashes, abrasions, contusions, and fresh bite marks. Many other residents had deep scars and scabs from a long history of self-abuse or victimization" (p. 3). Due to inadequate supervision of residents with pica behavior (ingesting inedible objects), "[r]esidents have had to undergo

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				surgery, sometimes on a repeated basis, to remove foreign objects or to relieve bowel and other obstructions caused by pica. Physicians at Fairview have indicated that some residents have had surgery so frequently that any more operations resulting from pica would jeopardize their lives" (p. 8).
			Inadequate medical and mental health care	Dangerous psychotropic medication practices (p. 7-8). "Seventy percent of residents institution-wide have gum disease" (p. 8).
			Unsanitary conditions	"Many of the cottages we toured smelled of urine and waste. Sewage backup in cottage basements, up to three feet high on the walls, is permitted to remain for days. * * * [A]n August 1983 random sample of Fairview residents revealed

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				that 35% had pinworm infection, a parasite which is spread by fecal and oral routes in unclean environments" (p. 9).
Fort Stanton Hospital & Training School	NM	1985	Inadequate medical and mental health care	Facilities' sole physician wrote institution-wide prescriptions for prescription medications and powerful psychotropic medications, authorizing their use when nursing staff believes it necessary, in contravention of professional standards and creating substantial risk to patients (p. 2).
			Unreasonable use of chemical restraints	Psychotropic drugs being used to restrain patients without any physician assessment for the need for such measures (p. 2.)
			Inadequate mental health care	"Many residents are subjected to potentially dangerous" prescriptions of multiple psychotropic drugs

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				"without any medical justification" (p. 2)
Southbury Training School	CT	1985	Failure to provide reasonable supervision and safety	Low staffing levels lead to inadequate supervision, which permitted one resident to leave the facility and die of exposure; another was able to remove and hide a large knife (p. 10). In one cottage, staff compensate for low staffing level by placing "at least one resident in restraints for up to 12 hours a day due to the staff's inability to monitor his activities" (p. 10).
			Inadequate medical and mental health care	Investigation found "dangerous medication interactions and errors, and found that acute medical problems, such as fractures and infections, frequently do not receive critically necessary follow-up treatment" (p. 3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Use of psychotropic medications substantially departed from professional standards, creating substantial health risks for patients (pp. 3-6).
			Inadequate training; Unreasonable use of physical and chemical restraints	Facility's failure to provide adequate training program resulted in "a dangerous reliance on the use of both physical and chemical restraint" (p. 6).
Hinds County Detention Center	MS	1986	Inadequate medical and mental health care	County Jail was being used to house mentally ill persons awaiting civil commitment hearings or placement in a mental hospital for up to eleven days. At time of investigation, jail held 42 mentally-ill detainees (pp. 1-2). No mental health treatment was provided during period of confinement (p. 3). "Male mentally-ill detainees were confined * * * in a small cell designed to serve as the

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				'drunk tank.' Some of the detainees were placed in hand and leg irons" (p. 3).
Westboro State Hospital	MA	1986	Unsanitary conditions	"The smell and sight of urine and feces pervade not only the toilet areas, but ward floors and walls as well" (p. 3). "Bathrooms and showers were filthy. Living areas are infested with vermin. There are consistent shortages of clean bed sheets, face cloths, towels and underwear. Open commodes with human waste in them were often found in rooms to which many patients in unclean geri-chairs are confined all day, including meal times" (p. 3). "[N]on-sterile techniques are used when changing patients' dressings and feeding tubes" (p. 3).
			Inadequate medical and mental health care	Patients' physical illnesses are often misdiagnosed as psychological

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				problems, resulting in "increased dosages of potentially dangerous antipsychotic drugs" (p. 5). "Acutely life threatening illnesses * * * are also not detected appropriately or on a timely basis.* * * [I]nappropriate and inadequate medical care preceded many of the[] deaths" reviewed during the investigation (p. 5). "Patients also frequently do not receive prescribed medications because the ward or pharmacy lacks adequate supplies" (p. 4).
			Unreasonable use of physical and chemical restraints	Facility used sedating drugs on elderly patients for no medically justifiable reason, but instead to control residents' behavior "subjecting vulnerable geriatric patients to the dangerous effects of

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				inappropriate drug usage and over-medication" (p. 7).
			Failure to provide reasonable supervision and safety; Inadequate training	pp. 7-8
Kalamazoo Regional Psychiatric Hospital	MI	1986	Inadequate training; Unreasonable use of physical restraints	Inadequate staffing prevents the facility from providing treatment that could "reduce or eliminate unreasonable risks to [patients'] personal safety and the undue use of bodily restraint" (p. 2).
			Inadequate medical and mental health care	Facility fails to adequately monitor efficacy and side effects of potentially dangerous drugs, creating unjustifiable risk of "deleterious side effects, tardive dyskinesia, involuntary, abnormal muscle movements, akathisia, and parkinsonism" (p. 3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Napa State Hospital	CA	1986	Failure to provide reasonable supervision and safety; Unreasonable use of physical and chemical restraints	Severe staffing shortages "result in patient management, in lieu of treatment, through the inappropriate use of seclusion, chemical restraint, and physical restraint" (p. 2). Restraint practices "pose significant hazards to the personal safety of NSH patients" (p. 4).
			Inadequate medical and mental health care; Inadequate training	Certain medication practices at facility "violated all known standards of medical practice" resulting in great danger to patient safety (p. 2). There was no monitoring of drug side effects and several patients exhibited an "antipsychotic drug-induced side effect, potentially irreversible, that may result in permanent physiological damage" (p. 3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Facility failed to provide training programs adequate to protect patient safety and avoid need for restraint and seclusion (p. 5).
Metropolitan Developmental Center	LA	1986	Inadequate medical and mental health care	"MDC employs antipsychotic medication primarily as a means of controlling behavior without proper [medical] justification." As a result, "[n]umerous residents demonstrated serious neurological side effects from sustained exposure to high doses of antipsychotic drugs" (p. 2). Facility had no program to monitor for serious, potentially irreversible side effects of these medications (pp. 2-3). Other residents "have been exposed to an extreme risk of drug-induced toxic poisoning by the absence of preliminary and periodic drug-level testing" (p. 3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Belle Chasse State School	LA	1986	Inadequate medical and mental health care	Administration of psychotropic drugs substantially departed from professional standards. There was no program to detect "Tardive Dyskinesia" which is "an antipsychotic drug induced side effect, potentially irreversible, that may result in permanent physiological damage" (p. 2).
Broadview, Cleveland & Warrensville Developmental Centers	OH	1987	Inadequate training; Unreasonable use of chemical restraints	In the absence of adequate training programs, "staff overuse psychotropic medication to control the behavior of residents" (p. 1).
			Inadequate mental health care	p. 2
Montgomery Developmental Center	OH	1987	Inadequate medical and mental health care; Failure to provide reasonable supervision and safety	pp. 2-3

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Los Lunas Hospital and Training School	NM	1988	Inadequate training; Unreasonable use of chemical restraints	"[S]traightjackets and ammonia inhalants are used as a consequence for antisocial behavior. Restrained individuals are in some cases isolated in a room with a closed door out of sight of staff. This practice, absent adequate surveillance, places severely handicapped residents at great risk of injury and is not professionally justifiable" (p. 2). "Los Lunas staff are using physical restraints, isolation and punishment * * * to control the behavior of residents in lieu of necessary training programs" (p. 2).
			Failure to provide reasonable supervision and safety	Due to lack of supervision, a woman was raped, developed peritonitis, and died (p. 3).
			Inadequate medical and mental health care	Facility provides almost no physical therapy to the large number of patients with body deformities who need

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				therapy "to prevent muscular or skeletal breakdown" (p. 3).
W.A. Howe Developmental Center	IL	1989	Inadequate training; Unreasonable use of physical and chemical restraints	"To control resident behavior, in lieu of professionally designed training programs, staff resort to chemical and physical restraints" (p. 3).
			Inadequate medical and mental health care	"Due to the lack of adequate medical supervision of patients, early signs of illness and disease go undetected and/or untreated" (p. 5).
			Failure to provide reasonable supervision and safety	Patient was dead on the floor of her room for some time before staff discovered her, after staff failed to perform scheduled room checks. A patient strangled to death while left unsupervised in improperly-applied restraints. A resident who was left unsupervised ran out the front door and into traffic, where she was killed (pp. 6-7).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Great Oaks Center	MD	1990	Failure to provide reasonable supervision and safety; Inadequate training	Investigation found that inadequate supervision contributed to "an alarmingly high frequency of resident injuries" (p. 5). Inadequate training program "fails to reduce self-abusive, aggressive, and other maladaptive and inappropriate behaviors." "As a result of these problems, rocking, pacing, and aimlessly wandering residents were seen throughout the institution. Instances of self-abuse were not an uncommon sight; observed attempts to intervene appropriately were rare. Many residents were observed to have cuts, bruises and scrapes. Clearly, many of the injuries may have been preventable with more effective programming and if more trained staff were available" (p. 3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Unreasonable use of physical and chemical restraints	"Staff resort to chemical and physical restraints to control residents' behavior, in lieu of professionally designed training programs" (p. 3).
			Inadequate mental health care	p. 4
			Abuse of residents	A number of staff had been disciplined or criminally charged for abusing patients (p. 5 n.1).
Hawaii State Hospital	HI	1990	Inadequate food, clothing and shelter	Staff at facility confirmed that there was often insufficient food; "Staff reported that patients are often wrapped in blankets and sheets due to the absence of adequate clothing"; inadequate items for basic personal hygiene (p. 2).
			Unsanitary conditions	"[S]anitation is grossly inadequate. During a tour of [one unit] our consultants had to walk around numerous puddles of urine. * * * * Kitchen facilities exhibited signs of serious cockroach

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				infestation and other unsanitary practices" (p. 3).
			Inadequate medical and mental health care	"[D]rug practices at HSH are seriously deficient and represent significant departures from generally accepted medical standards" (p. 3).
			Unreasonable use of physical and chemical restraints; Inadequate training	"In view of serious, chronic and facility-wide staffing shortages, HSH staff employ bodily restraints -- physical restraints, seclusion, and chemical restraints -- at an unjustifiably high level solely for their own convenience or in lieu of professionally designed treatment programs" (p. 5).

II. Investigations Subsequent To Enactment of the Americans with Disabilities Act

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Arlington Developmental Center	VA	1991	Failure to provide reasonable supervision and safety; unsanitary conditions	"In many units, there was a pervasive smell of urine. Residents in diapers were wet; often their clothes were soaked through with urine" (p. 3).
			Inadequate medical care	"[W]e observed young children, some as young as two, whose limbs were severely contracted" from lack of physical therapy. "Many residents were left unattended in cribs, with no efforts being made to move their limbs, position them, or to provide any real physical therapy services" (p. 3). "The penis of another resident, a paraplegic with an in-dwelling Foley catheter, was eroded throughout its entire length due to inadequate care and monitoring" (p. 3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Inadequate medical care contributed to deaths of five residents in past six months (p. 4).
			Abuse of residents	pp. 3-4
			Inadequate training	pp. 8-9
Northern Virginia Training Center	VA	1991	Inadequate training; Unreasonable use of physical and chemical restraints	In part because of inadequate training programs, use of restraints was pervasive: "restraint is used so frequently that it appears to be the treatment of choice rather than a technique of last resort" (p. 4).
			Inadequate medical and mental health care	"Serious medical conditions and marked functional deterioration are not comprehensively evaluated or effectively treated" due to inadequate medical system (p. 5).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Boswell Retardation Center	MS	1991	Inadequate training; Unreasonable use of physical and chemical restraints	"Boswell's staff are using restraints, isolation and punishment to control the behavior of residents in lieu of necessary training programs" (p. 2).
			Inadequate mental health care	pp. 3-4
			Unsanitary conditions	p. 5
Embreeville Center	PA	1991	Inadequate medical and mental health care	Delays in emergency medical care contributed to patient death (p. 2).
			Abuse of residents	Undercover agent observed repeated instances of abuse over nine-week period (p. 3).
			Inadequate training programs	p. 2
Agnews Developmental Center	CA	1991	Unsanitary conditions	"Clients and residents smelled of urine and feces" (p. 2).
			Unreasonable use of physical and chemical restraints	Bodily restraint and medication used in lieu of training programs or adequate staff supervision (pp. 4-5).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate medical care	Investigation found "resident after resident whose legs had lost all muscle tone and whose hip, knee and ankle joints had become permanently fixed or cemented in place in a deformed frog-leg or windswept position due to months and even years of inactivity" (p. 2). "[I]nordinate delays in diagnosing and responding to serious resident illness" placed large population of medically fragile patients at substantial risk (pp. 5-6)
			Abuse of residents	Administrators "confirmed to us that staff abuse of residents is a serious problem" (p. 2).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Memphis Mental Health Institute	TN	1992	Inadequate medical and mental health care	Deficiencies in the facility's medical care system contributed to two recent deaths (pp. 5-6). Lack of psychiatrists leads to serious errors in diagnosis and medication prescription (pp. 7-8).
			Unreasonable use of physical and chemical restraints	"Patients at MMHI are subjected to both an undue amount of bodily restraint and dangerous restraint practices" (p. 9). "[S]taff members are placing patients inappropriately in physical restraints simply because they are confused or disoriented." Patients are also restrained while sedated, "a substantial departure from accepted standards of psychiatric care" (pp. 9-10).
Fircrest Residential Habilitation Center	WA	1992	Failure to provide reasonable supervision and safety	"[R]esidents suffer needless serious injuries" due to lack of supervision, including an average of "410 incidents per month for some

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				440 residents" (p. 1). "Numerous residents were seen with fresh wounds and lacerations, including shaved spots on heads revealing stitches and healing injuries; red marks and significant bruises; multiple scabs and scars, and large bandages or casts" (pp. 1-2). "Our consultants observed residents engaged in self-injurious behavior, having seizures, masturbating in open view -- all without staff intervention of any kind" (p. 2). "[O]ne resident was found dead in the day room of a living unit; the resident had been dead for up to three hours before her body was discovered by staff" (p. 2). Dangerous positioning and feeding practices put residents' lives at risk (p. 2).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate training	"Due to a lack of human interaction and care, residents have developed significant stereotypic, maladaptive or anti-social behaviors" including "headbanging, eating foreign objects and pulling hair, to waving arms, flicking fingers and other self-stimulatory activities" (p. 1). "Much of the anti-social, maladaptive behavior, injuries and use of restraints is attributable, in significant part, to the lack of * * * training programs" (p. 5).
			Unreasonable use of physical and chemical restraints	Physical restraints, including "staff incapacitating residents by holding them down involuntarily on the floor or elsewhere for a period of 'enforced relaxation'" were pervasively "used as punishment, for the convenience of staff and in lieu of training programs" (p. 4-5).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Forrest County Jail	MS	1993	Inadequate mental health care	"There are no mental health services available at the jail and the holding cells into which disturbed or mentally-ill * * * prisoners are placed pose a direct threat to their health and safety" (p. 2). "During the course of our tour of the jail, our consultants observed a severely mentally ill inmate, clad only in an undershirt, housed in the general population" where he had been waiting for several weeks for a transfer to a mental health facility. "He had allegedly eaten some glass and was prone to defecate on the floor of the cell" (pp. 2-3).
Arizona State Hospital	AZ	1993	Unreasonable use of physical and chemical restraints	Patients "are routinely put into five-point restraints (a practice where a patient is restrained on a bed and bound by the ankles, by the wrists with the arms to the side, and by

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			-	a strap across the abdomen) and placed into a locked seclusion room" for convenience of staff. Leaving a restrained patient unsupervised creates "great risk of harm from choking and asphyxiation" (p. 2).
Jones County Jail	MS	1993	Inadequate medical and mental health care	Mentally ill inmates, and mentally ill persons detained pending civil commitment proceedings, housed in five-by-six foot steel cage, sometimes for months (p. 4).
Chicago-Read Mental Health Center	IL	1993	Inadequate mental health care; Inadequate training	pp. 1-2
			Unreasonable use of physical restraints	p. 2-3
Sonoma Developmental Center	CA	1994	Failure to provide reasonable supervision and safety	"As a result of inadequate supervision, residents have been subjected to numerous, serious, unnecessary injuries" (p. 2).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				In one incident, a resident drowned in a bathtub while unattended (p. 2). In another, one resident was attacked by another with a knife (p. 2).
			Inadequate training	Training programs are inadequate and lead to harm from unaddressed behaviors and to the unnecessary and unreasonable use of physical and chemical restraints (pp. 4-6).
			Inadequate medical care	Improper feeding practices for severely disabled residents "subject them to severe risk of choking, aspiration and aspiration pneumonia" (p. 3). "The lack of physical therapists and physical therapy services has led to the development of undue contractures, muscle atrophy, inappropriate body growth, and physical degeneration" (p. 3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				"The failure of staff to properly maintain [tracheostomy] tubes subjects residents to the risk of death from suffocation and presents other significant health risks, including infection" (p. 3).
Southern & Central Wisconsin Developmental Centers	WI	1994	Failure to provide reasonable supervision and safety	Inadequate supervision has led to serious resident injuries. For example, one elderly resident with a condition that creates a great risk of falling was taken to the hospital for an injury caused by a fall, whereupon hospital staff noted that she had fallen 62 times that day (p. 10).
			Inadequate medical and mental health care	While facility has over 300 residents with seizure disorders, management practices are dangerously deficient; some patients kept on medications with strong and dangerous side effects for years after they are no longer necessary; some are kept on potentially

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				dangerous drugs even though they are not helping. For example, one patient who had been seizure free for six years, was kept on medication even though lab results showed that dosage was too low to be having any effect and even though patient appeared to be suffering from dementia as a side effect of the drug (p. 3-4). Facility's use of psychotropic medications substantially departs from professional standards, exposing patients to unnecessary risks of dangerous side effects (pp.7-9).
			Inadequate training; Unreasonable use of physical restraints	pp. 10-13

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Eastern State Hospital and Hancock Geriatric Center	VA	1994	Inadequate mental health care; Inadequate training; Unreasonable use of physical and chemical restraints	pp. 1-6
Clover Bottom Developmental Center	TN	1995	Failure to provide reasonable supervision and safety	Many injuries linked to lack of supervision; "in one seven month period, a resident received injuries on twenty-six occasions," half of which required stitches (pp. 3-4).
			Inadequate training programs	pp. 5-8
			Inadequate medical and mental health care	"Residents languish in carts and ill-fitting wheelchairs, which exacerbate or allow physical deformities to progress -- in some cases to a point that the deformity may preclude a person from sitting upright in a wheelchair" (p.12).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Nat T. Winston Developmental Center	TN	1995	Inadequate training; Unreasonable use of physical and chemical restraints	"NTWDC, because of the ineffectiveness of its behavioral programs, relies on physical and chemical restraints to control residents' behavior" (p. 3). Lack of training programs and supervision contribute to high incidence of injuries, including "multiple bites, lacerations, broken bones, bruises and abrasions. One individual was injured 25 times * * * in an eight-month period. * * * Several residents were found attempting to cut themselves with knives or razorblades" (p. 4).
			Inadequate medical and mental health care	pp. 4-5
			Unsanitary conditions	"Sanitary conditions were very poor at the food facility"; "Mold and mildew were prevalent throughout the refrigerators and

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				coolers" because of plumbing leaks (pp. 5-6).
Greene Valley Developmental Center	TN	1995	Inadequate medical and mental health care	"Due to an inadequate medical care delivery system * * * residents are subjected to needless fractures, recurrent aspiration, preventable weight loss, recurring seizures, avoidable injuries, and other direct threats to their health" (p. 2). Psychiatrists prescribing dangerous combinations of drugs "absent any rational justification in violation of medical standards" (p. 3).
			Failure to provide reasonable supervision and safety	Due to lack of supervision, residents "are repeatedly 'found with blood' on them from injuries that occur outside of staff supervision. On other occasions, residents' severe injuries are discovered only during bathing or at bedtime" (p. 5).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				"[O]ne eleven year old boy apparently lost the sight in one eye from repeated headslapping which resulted in a detached retina. Other residents were noted with swollen, disfigured features resulting from years of self-injury. Still others had permanent scars from continual self-mutilation of their faces and arms" (p. 6).
			Inadequate training	Many residents' "destructive behaviors remain unaddressed" by training programs. "For example, one resident had large scratches on her face that had been self-inflicted; our consultant psychologist was informed that there was no program to modify or eliminate this unsafe behavior." The same was true for a patient who repeatedly reopened a face wound and one who had a history of pica for almost 20 years (p. 7).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Northern Virginia Mental Health Institute	VA	1995	Inadequate medical and mental health care	"[P]sychiatric care is grossly inadequate" and "poses direct threats to the health and safety of patients" (p. 3). "A county hospital is located only a few hundred yards [away], yet there have been a number of well-publicized deaths which are linked to substantial delays in providing adequate medical care" (p. 4). "[O]ne patient died partly because of a toxic buildup of antidepressants in her body. Another patient died from meningitis after a psychiatrist requested that she be seen by an internist who failed to appear to assess her life-threatening condition" (p. 4).
			Unreasonable use of physical and chemical restraints	"Due to inadequate staffing, NVMHI is unable to provide one-on-one monitoring for many residents who are suicidal or are in restraints or

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				seclusion and require such close supervision. Patients have been injured while being restrained and are then left unattended by medical personnel" (p. 5).
			Failure to provide reasonable supervision and safety	"[T]he lack of supervision and care is so grave that patients have been subjected to severe harm, including death" (p. 5).
Landmark Learning Center	FL	1996	Failure to provide reasonable supervision and safety	pp. 3-4
			Inadequate training and mental health care	pp. 4-10
Harold Jordan Habilitation Center	TN	1996	Inadequate training and mental health care	pp. 3-4

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Northern Virginia Mental Health Institute	VA	1996	Failure to provide reasonable supervision and safety	Problems with supervision persist: in the past year, there were 70 incidents of patients escaping from the facility, and an average of 27 incidents of patient self-injury and another 17 incidents of patient-on-patient violence each month (p. 7). Patients repeatedly injured themselves even when "supposedly under careful supervision." "One patient committed approximately 12 such acts of self-injury while on 'special observation' status." "One patient somehow managed to obtain a knife while in the seclusion room" (p. 7).
			Inadequate training	"[S]taff have resorted to calling the police and having patients arrested rather than addressing the underlying psychological issues" (p. 8).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Central State Hospital	VA	1997	Failure to provide reasonable supervision and safety	Lack of staffing and failure to supervise patients leads to repeated incidents of preventable injury and suicide attempts (pp. 3-5). One patient supposedly under 24-hour surveillance was found with 42 bruises over his body from unwitnessed incidents (p. 4).
			Inadequate medical and mental health care	pp. 5-7, 9-11
			Unreasonable use of physical and chemical restraints	Facility's use of restraints substantially departs from professional standards (pp. 7-9). Patient died after being left in five-point restraint on bed as punishment; her psychiatrist had warned facility staff not to restrain her because of seizure risk. Nonetheless, the "patient had spent over 300 hours of the last two months of her life in restraints" (p. 8).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Los Angeles County Jail	CA	1997	Inadequate mental health care	Jail system housing approximately 1,700 mentally ill inmates provides virtually no treatment to most inmates other than medication (p. 8). Jail exacerbates many inmates' illness by placing them in solitary confinement for 23 hours or more per day (p. 12).
			Failure to provide reasonable supervision and safety	Jail places many mentally ill inmates in general population, but requires them to wear uniforms that designate them as mentally ill. As a result, many inmates suffered from beatings and sexual assaults (pp. 14, 17).
Centro de Reeducacion para Adultos	PR	1997	Unsanitary conditions/ inadequate shelter	"Many of the buildings are dilapidated, decaying, and lack adequate plumbing and lighting." At one facility, "the showers do not work, the faucets do not work, and the toilets do not flush properly. In order to bathe the clients, staff dump

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				water from water tanks into large movable garbage cans from which the staff manually extract water using smaller buckets to pour it on the residents." Lack of water means that staff cannot wash hands after changing some patients' diapers (p. 3).
			Inadequate training and mental health care; Failure to provide reasonable supervision and safety	Investigators found patient "sitting on the floor * * * moaning to himself. We noticed a stream of blood trickling down his helmet. * * * * When the nurse removed his helmet, we discovered that [the patient's] head had been severely damaged due to years of self-abuse and head banging. [He] had butted and rammed his head into walls and post corners so often that he had pushed back completely his hair and skin on the front half of his head." Nonetheless, "the Commonwealth has failed to provide [the patient] with

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				professional psychological or behavioral services." Investigation found many other such individuals not receiving adequate care (p. 6).
			Unreasonable use of physical and chemical restraints	"Restraints are prevalent at many of the institutions * * * and are related lack of behavioral programming, training, and professional mental health intervention. * * * * [S]taff use a bed sheet to tie [a client's] waist and torso to a bench and to one of the iron bars at the facility to keep her from walking around the building and engaging in aggressive, maladaptive behaviors such as biting and hitting other clients. Staff tie [another client] up in four-point restraints to her bed for the entire time she is menstruating" (p. 7)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Center for Integral Services	PR	1997	Failure to provide reasonable supervision and safety	"On our tour of CIS, we generally found a dangerous environment for the clients. We noticed many CIS residents with fresh injuries, including lacerations and bruises, as well as historical remnants of past injuries suffered at CIS, such as disfiguring scars. Many clients had suffered facial injuries or severe injuries on the back of their heads with resulting deep scars and hair loss" (p. 3). Parents of clients showed pictures of "son with a very swollen, bulbous, purple and black eye. The father told us that his son has suffered a host of other injuries at CIS including a broken nose, a severe knee injury * * * and various head injuries, some requiring sutures." Another picture showed a client with a black eye, "a bloody left eye socket, bloody swollen lips, and a

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				face marked with fresh lacerations. The mother reported that her son has also suffered a fractured arm, numerous lacerations, bites, broken teeth" and "is now limited in the use of his hands to one index finger and thumb on each hand" (p. 4).
			Inadequate food, shelter and sanitation	"[T]he facility runs out of food monthly" and "is in a state of disrepair." "Residents have to sleep on beds with old, worn mattresses that are dirty and often wet." Toilets do not flush. As a result, "virtually all of the toilets on the men's side had urine and/or feces in them, producing a health hazard and an unpleasant, malodorous environment" (pp. 5-6). "Staff admitted to us that they routinely bathe the male clients by lining them up naked and hosing them down

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				in groups * * * with a garden hose" (pp. 6-7).
			Abuse of residents	Facility administrator acknowledged problems with protecting clients from staff abuse and stated that "one CIS staff member had recently been convicted for sodomizing a client" (p. 3).
			Unreasonable use of physical and chemical restraints	"CIS frequently uses restraints as a substitute for meaningful activity during the day or for appropriate programs to address maladaptive behaviors * * * to control residents they routinely use mechanical restraints, such as leather cuff belts (which are tied to the heavy metal beds around the limbs of the clients), restraint vests and straight jackets, and restraint nets" (p. 8).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate medical and mental health care	Facility "routinely runs out of certain critical drugs" such as anti-convulsant medications for epileptic patients, who suffered repeated untreated seizures as a result (pp. 5, 10). "Most of the residents are put on psychotropic medication simply to control their behaviors without appropriate psychiatric assessments, diagnoses, treatment and monitoring" (p. 9).
			Inadequate training programs	pp. 7-9
Hammond Developmental Center and Pinecrest Developmental Center	LA	1997	Failure to provide reasonable supervision and safety	Client went for weeks with an undetected fractured shoulder, even though obviously in pain and bruised (p. 6).
			Abuse of residents	Four staff members recently indicted for abusing residents, many other incidents of abuse documented by facility (pp. 4-5, 15-16).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Unreasonable use of physical and chemical restraints	"A staff member left a client in full mechanical restraints unattended for hours in a room with a known aggressor" while staff watched television (p. 5). Failure to provide adequate training programs leads to some patients being in restraints virtually non-stop (p. 12). Failure to monitor clients in restraints led to injuries (p. 12-13).
			Inadequate training	As a result of insufficient training programs, "residents' aberrant behaviors continue unabated, often get worse, and lead frequently to other destructive behaviors" (p. 10). Staff in one unit withheld food from clients if they misbehaved (p. 10).
			Inadequate medical and mental health care	pp. 13-15

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Holly Center	MD	1998	Failure to provide reasonable supervision and safety; Inadequate medical care	Improper feeding techniques for severely disabled residents contributed to a constant rate of hospitalization and several deaths from choking and severe respiratory problems (pp. 3-5). Systemic inadequacies in medical care contributed to the recent death of a severely handicapped and retarded resident (pp. 7-8).
			Inadequate training	pp. 8-13
Davies County Detention Center	KY	1998	Inadequate mental health care	No mental health services provided. "During our tour, we observed several acutely mentally ill individuals at the main jail, obviously in need of psychiatric evaluation and treatment, being left for days at a time in 'observation' -- *i.e.*, in a cell by themselves. One inmate was observed singing for hours on end, and eating his own feces" (p. 11).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				As a result of inadequate mental health and suicide prevention system, a 15-year-old boy killed himself (p. 12).
New Castle Developmental Center	IN	1998	Failure to provide reasonable supervision and safety; Inadequate training	"Injuries are pervasive throughout the campus. With a census of 164 individuals, New Castle averaged over 1,000 resident injuries/incidents on a monthly basis"; over a four-month period, "88 percent of New Castle residents sustained injuries; 82 percent of the residents were injured more than one time during this period" (pp. 2-3). In a single month, one resident was assaulted 20 times and another was assaulted 19 times (p. 3). "Other injuries are unwitnessed by staff, including bone fractures, bloodied noses and body bruises" (p. 3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				"[W]e witnessed instances in which residents engaged in aggressive and self-injurious behaviors (including head slapping, hand biting, eye gouging and table banging) without appropriate and timely staff intervention (p. 4).
			Inadequate medical and mental health care	While half of residents have epilepsy, facility's seizure management practices dangerously depart from accepted medical practices, increasing risk of liver and permanent brain damage (pp. 5-6). Insufficient levels of nursing staff lead to failures to identify and treat serious medical problems (pp. 6-7).
Georgia Juvenile Facilities	GA	1998	Inadequate mental health care	Inadequate mental health care provided throughout State's juvenile detention facilities and training schools (pp. 9-11, 19-22). Many mentally ill youth "end up locked in security units where they spend

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				large portions of their days isolated in small rooms with few activities. In these units, and elsewhere, they are often restrained, hit, shackled, put in restraint chairs for hours, and sprayed with [pepper spray] by staff who lack the training and resources to respond appropriately to the manifestations of mental illness" (p. 20).
Western State Hospital	VA	1999	Inadequate medical and mental health care	Facility fails to identify and address mental health needs, leading to inadequate treatment and risk of harm. In one case, patient identified as suicidal was given no treatment to address suicidal urges and subsequently hanged himself in his room (pp. 3-4). Physicians are not permitted to prescribe some medically-indicated drugs for budget reasons (pp. 5-6).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Inadequate medical care contributed to several recent deaths (p. 8).
			Unreasonable use of physical and chemical restraints	Facility uses excessive and dangerous restraint techniques (p. 7).
			Failure to provide reasonable supervision and safety; Inadequate training	Combination of inadequate staffing and training for patients results in high level of violence and injuries. Within one 90-day period, the facility of 370 patients "recorded 169 altercations, 81 instances of self-injurious behavior, and 128 falls" as well as 8 suicide attempts and 13 escapes. In the recent past, one patient committed suicide and was dead for an hour before being discovered (p. 9).
Rainier School & Frances Haddon Morgan Center	WA	1999	Unreasonable use of physical and chemical restraints	"In 1998, Rainier logged many thousands of hours of restraint use, without demonstrating that less restrictive interventions were tried or that

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				underlying behavioral support plans and services were adequate." For example, the facility's response to patients attempting to eat inedible objects (pica) or digging at their eyes or rectums was to place patients in nearly constant restraints: one patient with pica behavior spent 2,000 hours in a restraint suit over a six-month period; another averaged 600 hours per month for pica and rectal digging; another averaged 22 hours per day in the suit for rectal digging (pp. 2-3).
			Failure to provide reasonable supervision and safety; Inadequate training; Inadequate medical and mental health care	"Without the necessary specialized treatment, * * * residents have suffered serious harm. Residents * * * have blinded themselves from chronic behaviors, such as eye poking and head banging, that the facilities have not addressed in accordance with

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				accepted professional standards" (p. 7). Numerous incidents of unaddressed, dangerous behaviors, such as pica, head-banging, and eye-poking (pp. 7-8). In one facility, "approximately 20 percent of all Morgan residents were admitted to the emergency room or hospital, some on more than one occasion, for treatment of injuries" in a one-year period; during same year residents in another facility "suffered approximately 77 lacerations requiring sutures (32 involving the head), 37 bone fractures, 8 dislocated shoulders, and 2 incidents of finger amputation" (p. 10).
Clark County Detention Center	NV	1999	Inadequate mental health care	Jail failed adequately to identify mentally ill inmates and provide appropriate

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				treatment, resulting in serious harm and suicides (pp. 5-6).
Mercer County Geriatric Center	NJ	2002	Failure to provide reasonable supervision and safety	Staff fail to supervise geriatric patients. In one case "a family member used to visit at odd hours, only to find her unattended relative lying in urine, with parts of her naked body exposed" and with "unexplained skin bruises" (p. 3). More than a third of patients need assistance with eating and drinking, but poor nutrition and hydration practices result in substantial weight losses, hospitalization for dehydration, and even death. In one case, a resident with "an improperly positioned feeding tube" "slowly starved without adequate MCGC staff intervention." In another case, "staff fed a resident so quickly, she aspirated and died" (p. 6).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate medical and mental health care	Staff "fail to assess and treat residents properly for potentially serious medical and mental health problems," including failure to prevent and treat "residents with deep, bleeding bedsores, infections, and other potentially life-threatening conditions" (p. 4).
			Unreasonable use of physical and chemical restraints	"Staff routinely restrain residents while the staff engage in various tasks" (p. 5).
Banks-Jackson-Commerce Medical Center and Nursing Home	GA	2002	Failure to provide reasonable supervision and safety, and unreasonable use of physical and chemical restraints	Staff failed to take adequate measures to prevent serious falls, other than to restrain patients to chairs and beds (p.3). Other patients are injured by staff when transferred to and from bed, due to inadequate staff available or improper staff training (p. 4). Recently, one unsupervised resident wandered out of the facility in a wheelchair "crashed into a sidewalk curb,

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				overturned" and was seriously injured (p. 4).
			Inadequate medical and mental health care	Facility fails to provide physical therapy that could "prevent contractures (i.e., permanent muscular contraction)" due to lack of adequate staff to implement physical therapy orders (p. 6). Failure to move and reposition patients led to development of pressure sores, some of which became infected and require hospitalization (pp. 6-7). "[T]here is insufficient psychiatric consultation and oversight of medication use" at the facility; a psychiatrist visits the facility only 4 times per year. As a result, many patients have been on inappropriate doses or types of powerful psychiatric medications for years (pp. 9-10).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				"Approximately 60 residents at BJC have a diagnosis of depression, yet the facility fails to provide group or individual counseling, or other activities designed to treat depression" (p. 10).
			Inadequate food, clothing and shelter	While facility provided ample food and drink, it frequently failed to assist patients who needed feeding and drinking assistance. As a result, "numerous residents were hospitalized for conditions related to lack of adequate hydration" (p. 9).
Oakwood Developmental Center	KY	2002	Abuse of residents	Numerous incidents of staff abuse, leading to arrests of staff, including one incident in which "an Oakwood staff member stomped on a resident's head and rendered the resident unconscious" (p. 3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Failure to provide reasonable supervision and safety	Very high incidence of harm to residents at facility. During one 3 month period, one patient "had 30 reported incidents of harm" (p. 4). Even though treating professionals ordered close supervision of resident with pica, lax supervision permitted resident to engage in "at least 70 more attempted and/or actual incidents of pica behavior involving paper, trash, toilet paper, shoestrings, a washcloth, an ink pen, a sock, and fecal material." In another case, failure to supervise resulted in surgery to remove five plastic gloves staff had not observed the resident eating (p. 5).
			Unreasonable use of physical and chemical restraints	Lack of adequate behavior management leads to "increased use of physical and chemical restraints even though all of the Oakwood psychologists interviewed stated

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				that restraints and other aversive or restrictive procedures such as helmets and mittens are unnecessary and unwarranted" (p. 7).
			Inadequate medical and mental health care	More than half of the psychiatric diagnoses for patients are incorrect (p. 9). Many residents receive powerful psychotropic medications with potentially serious side effects "in place of adequate behavioral treatment plans" (p. 9). Facility does not adequately monitor those on psychotropic medications for serious, potentially irreversible side effects (p. 10). Although facility has more than 200 residents with seizure disorders, it provided neurology consultations for only 10-15 residents per month. As a result, many residents are simply

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				put on powerful anti-convulsant medications that might not be necessary, if treated properly, and which have serious side effects. One patient had been on such medications daily for 25 years, even though he had not had a seizure since 1976 and there was no indication that he had been seen by a neurologist until 2001 (p. 14). Failure to provide adequate medical monitoring and care had contributed to preventable resident deaths (p. 11). On numerous occasions, nurses gave medication to wrong patient, and pills are found lying on floors of living areas (p. 16).
Alexander Youth Services Center	AK	2002	Inadequate medical and mental health care	Inadequate mental health care systems contributed to preventable suicides (pp. 4-6).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Facility provided no professional individualized treatment, other than medication, to seriously mentally ill residents (p. 7).
Nevada Youth Training Center	NV	2002	Inadequate medical and mental health care	When mentally ill youth are receiving psychotropic medications at the time of entry into the facility, those "medications are automatically and permanently discontinued upon the youths' arrival" without individualized review by a medical professional (p. 9).
Santa Fe County Adult Detention Center	NM	2003	Inadequate medical and mental health care	Facility provides no qualified medical staff to treat inmates with serious mental illness, permitting counselors to make medical decisions about psychotropic medications (pp. 16-17).
Nim Henson Geriatric Center	NM	2003	Inadequate medical and mental health care	Facility medication practices substantially depart from professional

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				standards, placing patients at risk (pp. 3-6) Numerous patients put on feeding tubes unnecessarily, apparently for the convenience of staff (p. 11). Mentally ill patients "either are untreated or treated incorrectly" (p. 15).
			Unreasonable use of physical and chemical restraints	Facility sedates elderly patients for convenience of staff (pp. 8-9).
New Lisbon Developmental Center	NJ	2003	Failure to protect from physical harm	Residents subjected to frequent physical harm by other residents as well as by facility's staff (pp. 3-6).
			Inadequate medical and mental health care	Inadequate medical care provided to residents with bowel obstructions and seizure disorders, placing residents at risk of serious complications (pp. 17-18). Program to deal with behavioral problems does not comport with generally

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				accepted practice and staff are inadequately trained (pp. 7-9).
			Unreasonable use of physical and chemical restraints	Unnecessary use of mechanical restraints (pp. 9-10). Use of psychotropic drugs to control residents' behavior does not comport with generally accepted practices (pp. 10-11).
Los Angeles County Juvenile Halls	CA	2003	Inadequate medical and mental health care	Failure to treat an estimated 75% of juveniles in need of mental health care (p. 7). Failure to comport with professional standards regarding psychological counseling (pp. 12-14). Failure to administer psychotropic medications safely and effectively (pp. 14-16). Failure to effectively treat youths on suicide watch (pp. 17-18).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Excessive use of force	Unjustified use of Oleoresin Capsicum spray, including against juveniles with respiratory problems (pp. 20-22).
			Failure to protect from physical harm	Juveniles frequently subjected to violence from other juveniles, resulting in "significant injury" (pp. 22-23).
Garfield County Jail & Garfield County Work Center	OK	2003	Inadequate medical and mental health care	Provision of medical services to inmates "is seriously deficient and places inmates at risk of harm" (p. 10). Provision of mental health care inadequate, particularly in regard to suicide prevention (pp. 14-15).
Metropolitan State Hospital	CA	2003	Inadequate mental health care	Psychiatric services "substantially depart from generally accepted professional standards of care and expose the children and adolescents [in the facility] to a significant risk of harm and to actual harm" (p. 3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Inappropriate use of psychotropic medications (pp. 9-11).
			Unreasonable use of physical and chemical restraints	Use of physical and chemical restraints "substantially departs" from standards of care and exposes children to "excessive and unnecessary restrictive interventions" (p. 25).
Reginald P. White Nursing Facility	MS	2003	Inadequate mental health care	"[I]nappropriate use of multiple medications" and "excessive reliance on psychotropic medications (chemical restraints)" (p. 8).
Claudette Box Nursing Home	AL	2003	Inadequate medical and mental health care	Facility administers "excessive or unnecessary doses of psychotropics" (p. 3).
Oakley & Columbia Training Schools	MS	2003	Unreasonable use of physical restraints	Use of physical restraints such as "[h]og-tying and [p]ole-shackling" despite lack of "penological justification or therapeutic or rehabilitative benefit" of such disciplinary methods (pp. 5-9).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Excessive use of force	Facility staff "use excessive force with impunity" (pp. 9-11).
			Inadequate mental health care	"Many youth on psychiatric medications are not allowed to continue to receive those medications when they are admitted" (p. 15). Facilities "fail to employ adequate suicide prevention measures" (p. 16).

APPENDIX D

CONSTITUTION OF THE UNITED STATES

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

SELECTED PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. 12101 *et seq.*

§ 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards

and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Title II, Part A, of The Americans With Disabilities Act

§ 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 2410(4) of title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

§ 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

* * * * *

Title II, Part B, of The Americans With Disabilities Act

§ 12141. Definitions

As used in this subpart:

(1) Demand responsive system

The term "demand responsive system" means any system of providing designated public transportation which is not a fixed route system.

(2) Designated public transportation

The term "designated public transportation" means transportation (other than public school transportation) by bus, rail, or any other conveyance (other than transportation by aircraft or intercity or commuter rail transportation (as defined in section 12161 of this title)) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(3) Fixed route system

The term "fixed route system" means a system of providing designated public transportation on which a vehicle is operated along a prescribed route according to a fixed schedule.

(4) Operates

The term "operates", as used with respect to a fixed route system or demand responsive system, includes operation of such system by a person under a contractual or other arrangement or relationship with a public entity.

(5) Public school transportation

The term "public school transportation" means transportation by schoolbus vehicles of schoolchildren, personnel, and equipment to and from a public elementary or secondary school and school-related activities.

(6) Secretary

The term "Secretary" means the Secretary of Transportation.

§ 12142. Public entities operating fixed route systems

(a) Purchase and lease of new vehicles

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a public entity which operates a fixed route system to purchase or lease a new bus, a new rapid rail vehicle, a new light rail vehicle, or any other new vehicle to be used on such system, if the solicitation for such purchase or lease is made after the 30th day following July 26, 1990, and if such bus, rail vehicle, or other vehicle is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) Purchase and lease of used vehicles

Subject to subsection (c)(1) of this section, it shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a public entity which operates a fixed route system to purchase or lease, after the 30th day following July 26, 1990, a used vehicle for use on such system unless such entity makes demonstrated good faith efforts to purchase or lease a used vehicle for use on such system that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) Remanufactured vehicles

(1) General rule

Except as provided in paragraph (2), it shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a public entity which operates a fixed route system—

(A) to remanufacture a vehicle for use on such system so as to extend its usable life for 5 years or more, which remanufacture begins (or for which the solicitation is made) after the 30th day following July 26, 1990; or

(B) to purchase or lease for use on such system a remanufactured vehicle which has been remanufactured so as to extend its usable life for 5 years or more, which purchase or lease occurs after such 30th day and during the period in which the usable life is extended;

unless, after remanufacture, the vehicle is, to the maximum extent feasible, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) Exception for historic vehicles

(A) General rule

If a public entity operates a fixed route system any segment of which is included on the National Register of Historic Places and if making a vehicle of historic character to be used solely on such segment readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to

meet the requirements of paragraph (1) and which do not significantly alter the historic character of such vehicle.

(B) Vehicles of historic character defined by regulations

For purposes of this paragraph and section 12148(b) of this title, a vehicle of historic character shall be defined by the regulations issued by the Secretary to carry out this subsection.

§ 12143. Paratransit as a complement to fixed route service

(a) General rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a public entity which operates a fixed route system (other than a system which provides solely commuter bus service) to fail to provide with respect to the operations of its fixed route system, in accordance with this section, paratransit and other special transportation services to individuals with disabilities, including individuals who use wheelchairs, that are sufficient to provide to such individuals a level of service (1) which is comparable to the level of designated public transportation services provided to individuals without disabilities using such system; or (2) in the case of response time, which is comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities using such system.

(b) Issuance of regulations

Not later than 1 year after July 26, 1990, the Secretary shall issue final regulations to carry out this section.

(c) Required contents of regulations

(1) Eligible recipients of service

The regulations issued under this section shall require each public entity which operates a fixed route system to provide the paratransit and other special transportation services required under this section—

(A)(i) to any individual with a disability who is unable, as a result of a physical or mental impairment (including a vision impairment) and without the assistance of another individual (except an operator of a wheelchair lift or other boarding assistance device), to board, ride, or disembark from any vehicle on the system which is readily accessible to and usable by individuals with disabilities;

(ii) to any individual with a disability who needs the assistance of a wheelchair lift or other boarding assistance device (and is able with such assistance) to board, ride, and disembark from any vehicle which is readily accessible to and usable by individuals with disabilities if the individual wants to travel on a route on the system during the hours of operation of the system at a time (or within a reasonable period of such time) when such a vehicle is not being used to provide designated public transportation on the route; and

(iii) to any individual with a disability who has a specific impairment-related condition which prevents such individual from traveling to a boarding location or from a disembarking location on such system;

(B) to one other individual accompanying the individual with the disability; and

(C) to other individuals, in addition to the one individual described in subparagraph (B), accompanying

the individual with a disability provided that space for these additional individuals is available on the paratransit vehicle carrying the individual with a disability and that the transportation of such additional individuals will not result in a denial of service to individuals with disabilities.

For purposes of clauses (i) and (ii) of subparagraph (A), boarding or disembarking from a vehicle does not include travel to the boarding location or from the disembarking location.

(2) Service area

The regulations issued under this section shall require the provision of paratransit and special transportation services required under this section in the service area of each public entity which operates a fixed route system, other than any portion of the service area in which the public entity solely provides commuter bus service.

(3) Service criteria

Subject to paragraphs (1) and (2), the regulations issued under this section shall establish minimum service criteria for determining the level of services to be required under this section.

(4) Undue financial burden limitation

The regulations issued under this section shall provide that, if the public entity is able to demonstrate to the satisfaction of the Secretary that the provision of paratransit and other special transportation services otherwise required under this section would impose an undue financial burden on the public entity, the public entity, notwithstanding any other provision of this section (other than paragraph (5)), shall only be required to pro-

vide such services to the extent that providing such services would not impose such a burden.

(5) Additional services

The regulations issued under this section shall establish circumstances under which the Secretary may require a public entity to provide, notwithstanding paragraph (4), paratransit and other special transportation services under this section beyond the level of paratransit and other special transportation services which would otherwise be required under paragraph (4).

(6) Public participation

The regulations issued under this section shall require that each public entity which operates a fixed route system hold a public hearing, provide an opportunity for public comment, and consult with individuals with disabilities in preparing its plan under paragraph (7).

(7) Plans

The regulations issued under this section shall require that each public entity which operates a fixed route system—

(A) within 18 months after July 26, 1990, submit to the Secretary, and commence implementation of, a plan for providing paratransit and other special transportation services which meets the requirements of this section; and

(B) on an annual basis thereafter, submit to the Secretary, and commence implementation of, a plan for providing such services.

(8) Provision of services by others

The regulations issued under this section shall—

(A) require that a public entity submitting a plan to the Secretary under this section identify in the plan any person or other public entity which is providing a paratransit or other special transportation service for individuals with disabilities in the service area to which the plan applies; and

(B) provide that the public entity submitting the plan does not have to provide under the plan such service for individuals with disabilities.

(9) Other provisions

The regulations issued under this section shall include such other provisions and requirements as the Secretary determines are necessary to carry out the objectives of this section.

(d) Review of plan

(1) General rule

The Secretary shall review a plan submitted under this section for the purpose of determining whether or not such plan meets the requirements of this section, including the regulations issued under this section.

(2) Disapproval

If the Secretary determines that a plan reviewed under this subsection fails to meet the requirements of this section, the Secretary shall disapprove the plan and notify the public entity which submitted the plan of such disapproval and the reasons therefor.

(3) Modification of disapproved plan

Not later than 90 days after the date of disapproval of a plan under this subsection, the public entity which submitted the plan shall modify the plan to meet the requirements of this section and shall submit to the Secre-

tary, and commence implementation of, such modified plan.

(e) "Discrimination" defined

As used in subsection (a) of this section, the term "discrimination" includes—

(1) a failure of a public entity to which the regulations issued under this section apply to submit, or commence implementation of, a plan in accordance with subsections (c)(6) and (c)(7) of this section;

(2) a failure of such entity to submit, or commence implementation of, a modified plan in accordance with subsection (d)(3) of this section;

(3) submission to the Secretary of a modified plan under subsection (d)(3) of this section which does not meet the requirements of this section; or

(4) a failure of such entity to provide paratransit or other special transportation services in accordance with the plan or modified plan the public entity submitted to the Secretary under this section.

(f) Statutory construction

Nothing in this section shall be construed as preventing a public entity—

(1) from providing paratransit or other special transportation services at a level which is greater than the level of such services which are required by this section,

(2) from providing paratransit or other special transportation services in addition to those paratransit and special transportation services required by this section, or

(3) from providing such services to individuals in addition to those individuals to whom such services are required to be provided by this section.

§ 12144. Public entity operating a demand responsive system

If a public entity operates a demand responsive system, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, for such entity to purchase or lease a new vehicle for use on such system, for which a solicitation is made after the 30th day following July 26, 1990, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service such system provides to individuals without disabilities.

§ 12145. Temporary relief where lifts are unavailable

(a) Granting

With respect to the purchase of new buses, a public entity may apply for, and the Secretary may temporarily relieve such public entity from the obligation under section 12142(a) or 12144 of this title to purchase new buses that are readily accessible to and usable by individuals with disabilities if such public entity demonstrates to the satisfaction of the Secretary—

(1) that the initial solicitation for new buses made by the public entity specified that all new buses were to be lift-equipped and were to be otherwise accessible to and usable by individuals with disabilities;

(2) the unavailability from any qualified manufacturer of hydraulic, electromechanical, or other lifts for such new buses;

(3) that the public entity seeking temporary relief has made good faith efforts to locate a qualified manufac-

turer to supply the lifts to the manufacturer of such buses in sufficient time to comply with such solicitation; and

(4) that any further delay in purchasing new buses necessary to obtain such lifts would significantly impair transportation services in the community served by the public entity.

(b) Duration and notice to Congress

Any relief granted under subsection (a) of this section shall be limited in duration by a specified date, and the appropriate committees of Congress shall be notified of any such relief granted.

(c) Fraudulent application

If, at any time, the Secretary has reasonable cause to believe that any relief granted under subsection (a) of this section was fraudulently applied for, the Secretary shall—

(1) cancel such relief if such relief is still in effect; and

(2) take such other action as the Secretary considers appropriate.

§ 12146. New facilities

For purposes of section 12132 of this title and section 794 of Title 29, it shall be considered discrimination for a public entity to construct a new facility to be used in the provision of designated public transportation services unless such facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

§ 12147. Alterations of existing facilities

(a) General rule

With respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the

facility or part thereof, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, for a public entity to fail to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations. Where the public entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) Special rule for stations

(1) General rule

For purposes of section 12132 of this title and section 794 of Title 29, it shall be considered discrimination for a public entity that provides designated public transportation to fail, in accordance with the provisions of this subsection, to make key stations (as determined under criteria established by the Secretary by regulation) in rapid rail and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) Rapid rail and light rail key stations

(A) Accessibility

Except as otherwise provided in this paragraph, all key stations (as determined under criteria established by the Secretary by regulation) in rapid rail and light rail systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 3-year period beginning on July 26, 1990.

(B) Extension for extraordinarily expensive structural changes

The Secretary may extend the 3-year period under subparagraph (A) up to a 30-year period for key stations in a rapid rail or light rail system which stations need extraordinarily expensive structural changes to, or replacement of, existing facilities; except that by the last day of the 20th year following July 26, 1990, at least 2/3 of such key stations must be readily accessible to and usable by individuals with disabilities.

(3) Plans and milestones

The Secretary shall require the appropriate public entity to develop and submit to the Secretary a plan for compliance with this subsection—

(A) that reflects consultation with individuals with disabilities affected by such plan and the results of a public hearing and public comments on such plan, and

(B) that establishes milestones for achievement of the requirements of this subsection.

§ 12148. Public transportation programs and activities in existing facilities and one car per train rule

(a) Public transportation programs and activities in existing facilities

(1) In general

With respect to existing facilities used in the provision of designated public transportation services, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, for a public entity to fail to operate a designated public transportation program or activity conducted in such facilities so that, when viewed in the entirety, the program or activity is readily accessible to and usable by individuals with disabilities.

(2) Exception

Paragraph (1) shall not require a public entity to make structural changes to existing facilities in order to make such facilities accessible to individuals who use wheelchairs, unless and to the extent required by section 12147(a) of this title (relating to alterations) or section 12147(b) of this title (relating to key stations).

(3) Utilization

Paragraph (1) shall not require a public entity to which paragraph (2) applies, to provide to individuals who use wheelchairs services made available to the general public at such facilities when such individuals could not utilize or benefit from such services provided at such facilities.

(b) One car per train rule

(1) General rule

Subject to paragraph (2), with respect to 2 or more vehicles operated as a train by a light or rapid rail system,

for purposes of section 12132 of this title and section 794 of Title 29, it shall be considered discrimination for a public entity to fail to have at least 1 vehicle per train that is accessible to individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 5-year period beginning on the effective date of this section.

(2) Historic trains

In order to comply with paragraph (1) with respect to the remanufacture of a vehicle of historic character which is to be used on a segment of a light or rapid rail system which is included on the National Register of Historic Places, if making such vehicle readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity which operates such system only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to meet the requirements of section 12142(c)(1) of this title and which do not significantly alter the historic character of such vehicle.

§ 12149. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this subpart (other than section 12143 of this title).

(b) Standards

The regulations issued under this section and section 12143 of this title shall include standards applicable to facilities and vehicles covered by this part. The standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers

Compliance Board in accordance with section 12204 of this title.

§ 12150. Interim accessibility requirements

If final regulations have not been issued pursuant to section 12149 of this title, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under such section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under sections 12146 and 12147 of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

* * * * *

§ 12161. Definitions

As used in this subpart:

(1) Commuter authority

The term "commuter authority" has the meaning given such term in section 502(8) of Title 45.

(2) Commuter rail transportation

The term "commuter rail transportation" has the meaning given the term "commuter rail passenger transportation" in section 502(9) of Title 45.

(3) Intercity rail transportation

The term "intercity rail transportation" means transportation provided by the National Railroad Passenger Corporation.

(4) Rail passenger car

The term "rail passenger car" means, with respect to intercity rail transportation, single-level and bi-level coach cars, single-level and bi-level dining cars, single-level and bi-level sleeping cars, single-level and bi-level lounge cars, and food service cars.

(5) Responsible person

The term "responsible person" means—

(A) in the case of a station more than 50 percent of which is owned by a public entity, such public entity;

(B) in the case of a station more than 50 percent of which is owned by a private party, the persons providing intercity or commuter rail transportation to such station, as allocated on an equitable basis by regulation by the Secretary of Transportation; and

(C) in a case where no party owns more than 50 percent of a station, the persons providing intercity or commuter rail transportation to such station and the owners of the station, other than private party owners, as allocated on an equitable basis by regulation by the Secretary of Transportation.

(6) Station

The term "station" means the portion of a property located appurtenant to a right-of-way on which intercity or commuter rail transportation is operated, where such portion is used by the general public and is related to the provision of such transportation, including passenger platforms, designated waiting areas, ticketing areas, restrooms, and, where a public entity providing rail transportation owns the property, concession areas, to the extent that such public entity exercises control over the selection, design, construction, or alteration of the property, but such term does not include flag stops.

§ 12162. Intercity and commuter rail actions considered discriminatory

(a) Intercity rail transportation

(1) One car per train rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person who provides intercity rail transportation to fail to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in accordance with regulations issued under section 12164 of this title, as soon as practicable, but in no event later than 5 years after July 26, 1990.

(2) New intercity cars

(A) General rule

Except as otherwise provided in this subsection with respect to individuals who use wheelchairs, it shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a

person to purchase or lease any new rail passenger cars for use in intercity rail transportation, and for which a solicitation is made later than 30 days after July 26, 1990, unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(B) Special rule for single-level passenger coaches for individuals who use wheelchairs

Single-level passenger coaches shall be required to—

(i) be able to be entered by an individual who uses a wheelchair;

(ii) have space to park and secure a wheelchair;

(iii) have a seat to which a passenger in a wheelchair can transfer, and a space to fold and store such passenger's wheelchair; and

(iv) have a restroom usable by an individual who uses a wheelchair,

only to the extent provided in paragraph (3).

(C) Special rule for single-level dining cars for individuals who use wheelchairs

Single-level dining cars shall not be required to—

(i) be able to be entered from the station platform by an individual who uses a wheelchair; or

(ii) have a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger.

(D) Special rule for bi-level dining cars for individuals who use wheelchairs

Bi-level dining cars shall not be required to—

(i) be able to be entered by an individual who uses a wheelchair;

(ii) have space to park and secure a wheelchair;

(iii) have a seat to which a passenger in a wheelchair can transfer, or a space to fold and store such passenger's wheelchair; or

(iv) have a restroom usable by an individual who uses a wheelchair.

(3) Accessibility of single-level coaches

(A) General rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person who provides intercity rail transportation to fail to have on each train which includes one or more single-level rail passenger coaches—

(i) a number of spaces—

(I) to park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than one-half of the number of single-level rail passenger coaches in such train; and

(II) to fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than one-half of the number of single-level rail passenger coaches in such train,

as soon as practicable, but in no event later than 5 years after July 26, 1990; and

(ii) a number of spaces—

(I) to park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than the total number of single-level rail passenger coaches in such train; and

(II) to fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than the total number of single-level rail passenger coaches in such train,

as soon as practicable, but in no event later than 10 years after July 26, 1990.

(B) Location

Spaces required by subparagraph (A) shall be located in single-level rail passenger coaches or food service cars.

(C) Limitation

Of the number of spaces required on a train by subparagraph (A), not more than two spaces to park and secure wheelchairs nor more than two spaces to fold and store wheelchairs shall be located in any one coach or food service car.

(D) Other accessibility features

Single-level rail passenger coaches and food service cars on which the spaces required by subparagraph (A) are located shall have a restroom usable by an individual who uses a wheelchair and shall be able to

be entered from the station platform by an individual who uses a wheelchair.

(4) Food service

(A) Single-level dining cars

On any train in which a single-level dining car is used to provide food service—

(i) if such single-level dining car was purchased after July 26, 1990, table service in such car shall be provided to a passenger who uses a wheelchair if—

(I) the car adjacent to the end of the dining car through which a wheelchair may enter is itself accessible to a wheelchair;

(II) such passenger can exit to the platform from the car such passenger occupies, move down the platform, and enter the adjacent accessible car described in subclause (I) without the necessity of the train being moved within the station; and

(III) space to park and secure a wheelchair is available in the dining car at the time such passenger wishes to eat (if such passenger wishes to remain in a wheelchair), or space to store and fold a wheelchair is available in the dining car at the time such passenger wishes to eat (if such passenger wishes to transfer to a dining car seat); and

(ii) appropriate auxiliary aids and services, including a hard surface on which to eat, shall be provided to ensure that other equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals.

Unless not practicable, a person providing intercity rail transportation shall place an accessible car adjacent to the end of a dining car described in clause (i) through which an individual who uses a wheelchair may enter.

(B) Bi-level dining cars

On any train in which a bi-level dining car is used to provide food service—

(i) if such train includes a bi-level lounge car purchased after July 26, 1990, table service in such lounge car shall be provided to individuals who use wheelchairs and to other passengers; and

(ii) appropriate auxiliary aids and services, including a hard surface on which to eat, shall be provided to ensure that other equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals.

(b) Commuter rail transportation

(1) One car per train rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person who provides commuter rail transportation to fail to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in accordance with regulations issued under section 12164 of this title, as soon as practicable, but in no event later than 5 years after July 26, 1990.

(2) New commuter rail cars

(A) General rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person to purchase or lease any new rail passenger cars for use in commuter rail transportation, and for which a solicitation is made later than 30 days after July 26, 1990, unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(B) Accessibility

For purposes of section 12132 of this title and section 794 of Title 29, a requirement that a rail passenger car used in commuter rail transportation be accessible to or readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, shall not be construed to require—

(i) a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger;

(ii) space to fold and store a wheelchair; or

(iii) a seat to which a passenger who uses a wheelchair can transfer.

(c) Used rail cars

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29, for a person to purchase or lease a used rail passenger car for use in intercity or commuter rail transportation, unless such person makes demonstrated good faith efforts to purchase or lease a

used rail car that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(d) Remanufactured rail cars

(1) Remanufacturing

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person to remanufacture a rail passenger car for use in intercity or commuter rail transportation so as to extend its usable life for 10 years or more, unless the rail car, to the maximum extent feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(2) Purchase or lease

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person to purchase or lease a remanufactured rail passenger car for use in intercity or commuter rail transportation unless such car was remanufactured in accordance with paragraph (1).

(e) Stations

(1) New stations

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person to build a new station for use in intercity or commuter rail transportation that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secre-

tary of Transportation in regulations issued under section 12164 of this title.

(2) Existing stations

(A) Failure to make readily accessible

(i) General rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a responsible person to fail to make existing stations in the intercity rail transportation system, and existing key stations in commuter rail transportation systems, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(ii) Period for compliance

(I) Intercity rail

All stations in the intercity rail transportation system shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable, but in no event later than 20 years after July 26, 1990.

(II) Commuter rail

Key stations in commuter rail transportation systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than 3 years after July 26, 1990, except that the time limit may be extended by the Secretary of

Transportation up to 20 years after July 26, 1990, in a case where the raising of the entire passenger platform is the only means available of attaining accessibility or where other extraordinarily expensive structural changes are necessary to attain accessibility.

(iii) Designation of key stations

Each commuter authority shall designate the key stations in its commuter rail transportation system, in consultation with individuals with disabilities and organizations representing such individuals, taking into consideration such factors as high ridership and whether such station serves as a transfer or feeder station. Before the final designation of key stations under this clause, a commuter authority shall hold a public hearing.

(iv) Plans and milestones

The Secretary of Transportation shall require the appropriate person to develop a plan for carrying out this subparagraph that reflects consultation with individuals with disabilities affected by such plan and that establishes milestones for achievement of the requirements of this subparagraph.

(B) Requirement when making alterations

(i) General rule

It shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, with respect to alterations of an existing station or part thereof in the intercity or commuter rail transportation systems that affect or could affect the usability of the station or part

thereof, for the responsible person, owner, or person in control of the station to fail to make the alterations in such a manner that, to the maximum extent feasible, the altered portions of the station are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations.

(ii) Alterations to a primary function area

It shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, with respect to alterations that affect or could affect the usability of or access to an area of the station containing a primary function, for the responsible person, owner, or person in control of the station to fail to make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(C) Required cooperation

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for an owner, or person in control, of a station governed by subparagraph (A) or (B) to fail to provide reasonable cooperation to a responsible person with

respect to such station in that responsible person's efforts to comply with such subparagraph. An owner, or person in control, of a station shall be liable to a responsible person for any failure to provide reasonable cooperation as required by this subparagraph. Failure to receive reasonable cooperation required by this subparagraph shall not be a defense to a claim of discrimination under this chapter.

§ 12163. Conformance of accessibility standards

Accessibility standards included in regulations issued under this subpart shall be consistent with the minimum guidelines issued by the Architectural and Transportation Barriers Compliance Board under section 12204(a) of this title.

§ 12164. Regulations

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this subpart.

§ 12165. Interim accessibility requirements

(a) Stations

If final regulations have not been issued pursuant to section 12164 of this title, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under such section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that stations be readily accessible to and usable by persons with disabili-

ties as required under section 12162(e) of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that stations be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(b) Rail passenger cars

If final regulations have not been issued pursuant to section 12164 of this title, a person shall be considered to have complied with the requirements of section 12162(a) through (d) of this title that a rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such supplemental minimum guidelines as are issued under section 12204(a) of this title) governing accessibility of such cars, to the extent that such laws and regulations are not inconsistent with this subpart and are in effect at the time such design is substantially completed.

Title IV of The Americans With Disabilities Act

§ 12201. Construction

(a) In general

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) Relationship to other laws

Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I of this chapter, in transportation covered by subchapter II or III of this chapter, or in places of public accommodation covered by subchapter III of this chapter.

(c) Insurance

Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter[2] I and III of this chapter.

(d) Accommodations and services

Nothing in this chapter shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

§ 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in[3] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

---

[2] So in original. Probably should be "subchapters".

[3] So in original. Probably should be "in a".

§ 12203. Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

§ 12204. Regulations by Architectural and Transportation Barriers Compliance Board

(a) Issuance of guidelines

Not later than 9 months after July 26, 1990, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible

Design for purposes of subchapters II and III of this chapter.

(b) Contents of guidelines

The supplemental guidelines issued under subsection (a) of this section shall establish additional requirements, consistent with this chapter, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

(c) Qualified historic properties

(1) In general

The supplemental guidelines issued under subsection (a) of this section shall include procedures and requirements for alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities as defined in 4.1.7(1)(a) of the Uniform Federal Accessibility Standards.

(2) Sites eligible for listing in National Register

With respect to alterations of buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act (16 U.S.C. 470 et seq.), the guidelines described in paragraph (1) shall, at a minimum, maintain the procedures and requirements established in 4.1.7(1) and (2) of the Uniform Federal Accessibility Standards.

(3) Other sites

With respect to alterations of buildings or facilities designated as historic under State or local law, the guidelines described in paragraph (1) shall establish procedures equivalent to those established by 4.1.7(1)(b) and (c) of the Uniform Federal Accessibility Standards, and shall require, at a minimum, compliance with the requirements established in 4.1.7(2) of such standards.

§ 12205. Attorney's fees

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

§ 12206. Technical assistance

(c) Plan for assistance

(1) In general

Not later than 180 days after July 26, 1990, the Attorney General, in consultation with the Chair of the Equal Employment Opportunity Commission, the Secretary of Transportation, the Chair of the Architectural and Transportation Barriers Compliance Board, and the Chairman of the Federal Communications Commission, shall develop a plan to assist entities covered under this chapter, and other Federal agencies, in understanding the responsibility of such entities and agencies under this chapter.

(2) Publication of plan

The Attorney General shall publish the plan referred to in paragraph (1) for public comment in accordance with subchapter II of chapter 5 of title 5 (commonly known as the Administrative Procedure Act).

(b) Agency and public assistance

The Attorney General may obtain the assistance of other Federal agencies in carrying out subsection (a) of this section, including the National Council on Disability, the President's Committee on Employment of People with Disabilities, the Small Business Administration, and the Department of Commerce.

(c) Implementation

(1) Rendering assistance

Each Federal agency that has responsibility under paragraph (2) for implementing this chapter may render technical assistance to individuals and institutions that have rights or duties under the respective subchapter or subchapters of this chapter for which such agency has responsibility.

(2) Implementation of subchapters

(A) Subchapter I

The Equal Employment Opportunity Commission and the Attorney General shall implement the plan for assistance developed under subsection (a) of this section, for subchapter I of this chapter.

(B) Subchapter II

(i) Part A

The Attorney General shall implement such plan for assistance for part A of subchapter II of this chapter.

(ii) Part B

The Secretary of Transportation shall implement such plan for assistance for part B subchapter II of this chapter.

(C) Subchapter III

The Attorney General, in coordination with Secretary of Transportation and the Chair of the Architectural Transportation Barriers Compliance Board, shall implement such plan for assistance for subchapter III of this chapter, except for section 12184 of this title, the plan for assistance for which shall be implemented by the Secretary of Transportation.

(D) Title IV

The Chairman of the Federal Communications Commission, in coordinate with the Attorney General, shall implement such plan for assistance for title IV.

(3) Technical assistance manuals

Each Federal agency that has responsibility under paragraph (2) for implementing this chapter shall, as part of its implementation responsibilities, ensure the availability and provision of appropriate technical assistance manuals to individuals or entities with rights or duties under this chapter no later than six months after applicable final regulations are published under subchapters I, II, and III of this chapter and title IV.

(d) Grants and contracts

(1) In general

Each Federal agency that has responsibility under subsection (c)(2) of this section for implementing this chapter may make grants or award contracts to effectuate the purposes of this section, subject to the availability of appropriations. Such grants and contracts may be awarded to individuals, institutions not organized for profit and no part of the net earnings of which inures to the benefit or any private shareholder or individual (including educational institutions), and associations representing individuals who have rights or duties under this chapter. Contracts may be awarded to entities organized for profit, but such entities may not be the recipients or[1] grants described in this paragraph.

(2) Dissemination of information

Such grants and contracts, among other uses, may be designed to ensure wide dissemination of information about the rights and duties established by this chapter and to provide information and technical assistance about techniques for effective compliance with this chapter.

(e) Failure to receive assistance

An employer, public accommodation, or other entity covered under this chapter shall not be excused from compliance with the requirements of this chapter because of any failure to receive technical assistance under this section,

---

[1] So in original. Probably should be "of".

including any failure in the development or dissemination of any technical assistance manual authorized by this section.

§ 12207. Federal wilderness areas

(a) Study

The National Council on Disability shall conduct a study and report on the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System as established under the Wilderness Act (16 U.S.C. 1131 *et seq.*).

(b) Submission of report

Not later than 1 year after July 26, 1990, the National Council on Disability shall submit the report required under subsection (a) of this section to Congress.

(c) Specific wilderness access

(1) In general

Congress reaffirms that nothing in the Wilderness Act [16 U.S.C. 1131 et seq.] is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness area in order to facilitate such use.

(2) "Wheelchair" defined

For purposes of paragraph (1), the term "wheelchair" means a device designed solely for use by a mobility-

impaired person for locomotion, that is suitable for use in an indoor pedestrian area.

§ 12208. Transvestites

For the purposes of this chapter, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

§ 12209. Instrumentalities of the Congress

The General Accounting Office, the Government Printing Office, and the Library of Congress shall be covered as follows:

(1) In general

The rights and protections under this chapter shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) Establishment of remedies and procedures by instrumentalities

The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1).

(3) Report to Congress

The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) Definition of instrumentality

For purposes of this section, the term "instrumentality of the Congress" means the following:,[1] the General Accounting Office, the Government Printing Office, and the Library of Congress,.[1]

(5) Enforcement of employment rights

The remedies and procedures set forth in section 2000e-16 of this title shall be available to any employee of an instrumentality of the Congress who alleges a violation of the rights and protections under sections 12112 through 12114 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

(6) Enforcement of rights to public services and accommodations

The remedies and procedures set forth in section 2000e-16 of this title shall be available to any qualified person with a disability who is a visitor, guest, or patron of an instrumentality of Congress and who alleges a violation of the rights and protections under sections 12131 through 12150 or section 12182 or 12183 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

---

1 So in original. The comma probably should not appear.

(7) Construction

Nothing in this section shall alter the enforcement procedures for individuals with disabilities provided in the General Accounting Office Personnel Act of 1980 and regulations promulgated pursuant to that Act.

§ 12210. Illegal use of drugs

(a) In general

For purposes of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as an individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in

this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

(c) Health and other services

Notwithstanding subsection (a) of this section and section 12211(b)(3) of this title, an individual shall not be denied health services, or services provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

(d) "Illegal use of drugs" defined

(1) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or other provisions of Federal law.

(2) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

§ 12211. Definitions

(a) Homosexuality and bisexuality

For purposes of the definition of "disability" in section 12102(2) of this title, homosexuality and bisexuality are not

impairments and as such are not disabilities under this chapter.

(b) Certain conditions

Under this chapter, the term "disability" shall not include—

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

§ 12212. Alternative means of dispute resolution

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

§ 12213. Severability

Should any provision in this chapter be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of this chapter and such action shall not affect the enforceability of the remaining provisions of this chapter.

Supreme Court, U.S.
FILED
SEP 8 2003
OFFICE OF THE CLERK

(6)

No. 02-1667

IN THE
Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

GEORGE LANE, BEVERLY JONES, AND UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* ALABAMA, NEBRASKA, NEVADA, NORTH DAKOTA, OKLAHOMA, UTAH, AND WYOMING IN SUPPORT OF PETITIONER

WILLIAM H. PRYOR JR.
ATTORNEY GENERAL
NATHAN A. FORRESTER
SOLICITOR GENERAL
STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401

GENE C. SCHAERR*
RICHARD H. SINKFIELD, III
RYAN D. NELSON
KATHRYN R. HAUN
RICHARD H. MENARD JR.
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Amici Curiae

* Counsel of Record

[Additional Counsel Listed on Inside Cover]

September 8, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

55 pp

JON BRUNING
ATTORNEY GENERAL
STATE OF NEBRASKA
2115 State Capitol
Lincoln, NE 68509

BRIAN SANDOVAL
ATTORNEY GENERAL
STATE OF NEVADA
100 North Capitol Street
Carson City, NV 89701

WAYNE STENEHJEM
ATTORNEY GENERAL
STATE OF NORTH DAKOTA
State Capitol
600 E. Boulevard Ave.
Bismarck, ND 58505-0040

W.A. DREW EDMONDSON
ATTORNEY GENERAL
STATE OF OKLAHOMA
2300 North Lincoln
Boulevard, Suite 112
Oklahoma City, OK 73105

PATRICK J. CRANK
ATTORNEY GENERAL
STATE OF WYOMING
123 State Capitol
Cheyenne, WY 82002

MARK L. SHURTLEFF
ATTORNEY GENERAL
STATE OF UTAH
236 State Capitol
Salt Lake City, UT 84114

QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 (2002), to the extent it applies to the accessibility of public buildings, exceeds Congress's authority under Section 5 of the Fourteenth Amendment, thereby failing validly to abrogate the States' sovereign immunity from private damages claims.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	vi
INTEREST OF *AMICI CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. CONGRESS ACTED BEYOND ITS SECTION 5 POWER WHEN IT PURPORTED TO ABROGATE THE STATES' SOVEREIGN IMMUNITY FOR CLAIMS ALLEGING A FAILURE TO MAKE PUBLIC BUILDINGS ACCESSIBLE	6
A. This Court Can Appropriately Resolve The Constitutionality Of Title II's Abrogation Of Sovereign Immunity As Applied Only To The Accessibility Of Public Buildings, And Leave For Another Day The Constitutionality Of Abrogating Sovereign Immunity From Suits For Other Alleged Violations Of Title II	7
B. While Unfortunate, The Failure To Outfit Courthouses And Other Public Buildings So That Persons Of All Disabilities May Access Them Without Assistance Violates Neither Due Process Nor Equal Protection	11

TABLE OF CONTENTS – continued

Page

1. A State's Rational, if Unfortunate, Decision Not to Make Public Buildings Fully Accessible to Persons of All Disabilities Does Not Constitute an Equal Protection Violation 11

2. A State Does Not Offend Due Process by Failing to Provide Unassisted Access to Courthouses, Because There Is No Absolute Right to Unassisted Attendance at Court Proceedings 13

C. Neither The Statutory Text Nor The Legislative Record Of Title II Contains The Requisite Findings Or Evidence Of Past Unconstitutional Conduct By The States With Respect To The Accessibility Of Public Buildings 16

1. Congress Failed to Identify Any History or Pattern of Equal Protection or Due Process Violations 16

2. Congress Did Not Identify a Pattern of Discriminatory Conduct Attributable to the States Themselves 19

II. AS A PRACTICAL MATTER, THERE IS NO GOOD REASON TO ALLOW PRIVATE FEDERAL DAMAGE ACTIONS BASED ON THE ACCESSIBILITY OF PUBLIC BUILDINGS OWNED OR USED BY STATE GOVERNMENTS 22

A. Virtually Every State Already Has Statutes Or Regulations Requiring That Public Buildings Be Accessible To The Disabled 22

TABLE OF CONTENTS – continued

Page

B. The Potential Availability Of Injunctions And Federal Enforcement Actions To Require Compliance With Title II Provides Ample Additional Assurances Of Accessibility 25

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

	Page
Alsbrook v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999)	10
Amchem Prods., Inc. v. *Windsor*, 521 U.S. 591 (1997)	24
Board of Trustees v. *Garrett*, 531 U.S. 356 (2001)	*passim*
Boddie v. *Connecticut*, 401 U.S. 371 (1971)	14
Brown v. *North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999)	10
City of Boerne v. *Flores*, 521 U.S. 507 (1997)	4, 5, 6 16
City of Cleburne v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985)	11
City of Rome v. *United States*, 446 U.S. 156 (1980)	9
Federal Mar. Comm'n v. *South Carolina State Ports Auth.*, 535 U.S. 743 (2002)	1
Florida Prepaid Postsecondary Educ. Expense Bd. v. *College Sav. Bank*, 527 U.S. 627 (1999)	4, 6, 9
Gaston County, N.C. v. *United States*, 395 U.S. 285 (1969)	9
Heller v. *Doe*, 509 U.S. 312 (1993)	12, 18, 19
Illinois v. *Allen*, 397 U.S. 337 (1970)	14
Katzenbach v. *Morgan*, 384 U.S. 641 (1966)	8, 9
Kimel v. *Florida Bd. of Regents*, 528 U.S. 62 (2000)	16, 17
Maryland v. *Craig*, 497 U.S. 836 (1990)	14, 15
Nevada Dep't of Human Res. v. *Hibbs*, 123 S.Ct. 1972 (2003)	8, 9, 11
Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980)	13
Seminole Tribe v. *Florida*, 517 U.S. 44 (1996)	9
Snyder v. *Massachusetts*, 291 U.S. 97 (1934)	14

TABLE OF AUTHORITIES – continuted

	Page
South Carolina v. *Katzenbach*, 383 U.S. 301 (1966)	8, 9
Spector Motor Serv. v. *McLaughlin*, 323 U.S. 101 (1944)	10
Ex Parte Young, 209 U.S. 123 (1908)	2

STATUTES

42 U.S.C. § 12101	16, 17, 18, 20, 24
§ 12102(2)	24
§§ 12131-12134	2
§ 12133	25
§ 12142	7
§ 12143	7
§ 12162	7
§ 2000e-5(i)	25, 26
Ark. Code § 19-4-1415	24
Fla. Stat. ch. 553.501-553.513	24
Ga. Code Ann. § 30-3-3	24
Haw. Rev. Stat. § 103-50	24
Ind. Code § 22-13-4-1.5	24
La. Rev. Stat. tit. 40 § 1734	24
Mo. Rev. Stat. § 213.065	24
Neb. Rev. Stat § 20-127	24
N.H. Rev. Stat § 155-A:5	24
N.Y. Pub. Bldgs. Law § 51	24
N.C. Gen. Stat. § 168-2	24
N.D. Cent. Code § 48-02-19	24
Ohio Rev. Code Ann. § 3781.111	24
Or. Rev. Stat. § 447.220	24
R.I. Gen. Laws § 37-8-15	24
S.D. Codified Laws § 5-14-13	24
Tenn. Code Ann. § 68-120-204 (2003)	3
Vt. Stat. Ann. tit. 21 § 273	24
Va. Code Ann. § 2.2-1159	24

TABLE OF AUTHORITIES – continuted

	Page
Wash. Rev. Code § 70.92.110	24
Wis. Stat. § 101.13.	24
RULE	
Fed. R. Crim. P. 43	14
LEGISLATIVE HISTORY	
S. Rep. No. 101-116 (1989)	21
H.R. Rep. No. 101-485, pt. 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 512	21
136 Cong. Rec. H2614 (daily ed. May 22, 1990)	21

IN THE

Supreme Court of the United States

No. 02-1667

STATE OF TENNESSEE,

Petitioner,

v.

GEORGE LANE, BEVERLY JONES, AND UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* ALABAMA, NEBRASKA, NEVADA, NORTH DAKOTA, OKLAHOMA, UTAH, AND WYOMING IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The States of Alabama, Nebraska, Nevada, North Dakota, Oklahoma, Utah, and Wyoming respectfully submit this brief as *amici curiae* in support of Petitioner urging reversal of the judgment of the United States Court of Appeals for the Sixth Circuit. As sovereign States, *amici* have a strong interest in preserving the principles of dual sovereignty that are "a defining feature of our Nation's constitutional blueprint." *Federal Mar. Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002). Accordingly, *amici* have a powerful interest in ensuring that Congress's power to abrogate their sovereign immunity remains within the bounds

set by the Constitution, and is therefore circumscribed in a manner that recognizes the extraordinary nature of such an abrogation.

On a more practical level, *amici* have a strong interest in avoiding the litigation of private damage claims based upon Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134 ("ADA"). This is particularly true of claims that seek damages for a State's alleged failure to make a public building sufficiently "accessible" to satisfy the legitimate desires of all disabled citizens to get themselves into and out of public spaces. As detailed below, virtually all of the States, including these *amici*, have undertaken significant efforts in the past several years to make their public buildings more accessible. However, as a matter of policy, *amici* believe that private federal damage actions against the States, with their attendant costs and risks to state taxpayers, are not warranted. That is particularly true given the absence of any evidence that the States' management of public buildings routinely violated the *constitutional* rights of the disabled prior to the ADA's passage, or that it does so today.

That is not to say that any State is, or should be, allowed to discriminate against the disabled with impunity. When States violate Title II or the Constitution, federal courts may issue declaratory and injunctive relief. See *Ex Parte Young*, 209 U.S. 123 (1908). Nor do *amici* contend that they should never be liable for money damages for violations of Title II of the ADA. Sovereign immunity does not apply to suits brought by the United States. And a State, in the exercise of its sovereign powers, may waive its sovereign immunity to private suits for damages under the ADA. But the abrogation of sovereign immunity at issue here–particularly with respect to claims challenging the accessibility of State-owned or operated buildings–is neither within Congress's authority under the Fourteenth Amendment nor necessary as a matter of policy.

STATEMENT OF THE CASE

To avoid burdening the Court with another recitation of the facts, *amici* adopt the statement in Petitioner's brief. However, two points deserve particular emphasis.

First, nothing in Respondents' allegations–which of course must be accepted as true given the posture of this case–suggests that they were ever denied access to any Tennessee courthouses altogether. To the contrary, Respondent Lane's complaint confirms that, when he was unable to access particular rooms in a court building on his own, he was offered alternative means of access. These included the option of being carried up the stairs by security personnel and the option of having the hearing relocated to a more accessible room or building. See Pet. App. 15 & 16. There is no allegation that any of these options would have prevented him from participating fully in the pertinent proceedings, or would have placed him in any danger.

Second, like virtually all other States, the State of Tennessee voluntarily requires, as a matter of state law, that courthouses and other public buildings be made accessible to disabled persons. See Tenn. Code Ann. § 68-120-204 (2003). Indeed, the record reflects that one of the courthouses at issue in this dispute was retrofitted with an elevator after some of the events of which Respondents complain, but before the filing of the present lawsuit. Pet. App. 17.

SUMMARY OF ARGUMENT

I. Under certain narrow circumstances, Section 5 of the Fourteenth Amendment empowers Congress to abrogate a State's immunity from liability for violation of federal remedial legislation. Although *amici* support Petitioner's request that Title II's purported abrogation of sovereign immunity be invalidated in its entirety, the Court need not go that far here. The only question the Court need address in this

case is whether Congress validly acted within its Section 5 authority in attempting to abrogate States' immunity for alleged violations of Subtitle A of Title II, and only insofar as those provisions apply to the physical accessibility of public buildings.

Of course, the mere invocation of Section 5 does not effect compliance with the Fourteenth Amendment. See *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 637-39 (1999). A court must determine whether Congress acted within its Section 5 authority by examining for itself whether the attempt to abrogate satisfies the requirements announced in *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997) (plurality op.); see also *Board of Trustees* v. *Garrett*, 531 U.S. 356, 365 (2001). Here, Congress's attempt to abrogate the States' sovereign immunity for alleged violations of Title II, Subtitle A, is invalid, at least as to claims challenging the accessibility of public buildings, for two fundamental reasons.

First, looking to the "metes and bounds" of the "constitutional right in question," *id.* at 368, there is no general constitutional right to public buildings that are physically "accessible" to the disabled, however desirable such accessibility is as a matter of policy. A government's failure to make a public building satisfy modern standards of accessibility does not violate the Fourteenth Amendment's Equal Protection Clause as long as that failure has a rational basis – which cost considerations alone will almost always provide. And a government's failure to make a public courthouse accessible (in the modern sense) does not violate the Due Process Clause as long as the government is willing, as it was here, to provide alternative means for a disabled person to participate meaningfully in any proceedings in which he is involved.

Second, in addition to the "proportionality" concerns addressed in Petitioner's brief, there simply is no "congruence" between Congress's findings and the alleged

constitutional violations that the accessibility features of Title II are designed to remedy. See *City of Boerne*, 521 U.S. at 519-20. Neither the statutory text nor the legislative record reflects any congressional finding of a history or pattern of constitutional violations on the part of States. And even had Congress identified such a pattern, Title II's remedies fail the "congruence" requirement because they are not linked to, or justified by, any identifiable course of unconstitutional State conduct.

Because these considerations compel the conclusion that Congress did not act within its authority in abrogating the States' sovereign immunity with respect to accessibility claims under Title II, that immunity (as reflected in the Eleventh Amendment) precludes private suits for damages under that statute.

II. Constitutional considerations aside, Title II's purported abrogation of State sovereign immunity from suits involving access to public buildings is unnecessary as a practical matter. First, virtually every State in the Union already guarantees disabled persons access to public buildings. Moreover, private damages actions to enforce the federal guarantee would more likely undermine than advance the ADA's goals. It would divert scarce resources from affirmative remedial measures to defensive litigation, and it would tend to eliminate the States' incentives to provide even stronger protections for the disabled under state law.

Second, to the extent State guarantees of access are thought insufficient, the other remedies afforded by Title II (assuming it is a valid exercise of Congress's Article I power) provide more than adequate reinforcement. The principal remedy, injunctive relief, is ideally suited to right the wrongs at issue. In virtually all imaginable cases, restricted access to public buildings can be alleviated by a stroke of the judicial pen. Title II's other enforcement provisions, including federal administrative enforcement with the possibility of civil

penalties, are also better suited to promoting Title II's goals than the prospect of potentially devastating civil liability.

ARGUMENT

I. CONGRESS ACTED BEYOND ITS SECTION 5 POWER WHEN IT PURPORTED TO ABROGATE THE STATES' SOVEREIGN IMMUNITY FOR CLAIMS ALLEGING A FAILURE TO MAKE PUBLIC BUILDINGS ACCESSIBLE.

To determine whether Section 5 legislation validly abrogates the States' sovereign immunity from damage actions, this Court applies the tripartite test announced in *City of Boerne*, 521 U.S. at 519. See *Garrett*, 531 U.S. at 365. First, a court must "identify with some precision the scope of the constitutional right at issue." *Id.* Second, once a court determines the "metes and bounds" of that right, it examines "whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States." *Id.* at 368. Third, if (and only if) there is a pattern of identified unconstitutional conduct on the part of the state, a court determines whether there is "a *congruence* and *proportionality* between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520 (emphasis added); see also *Florida Prepaid*, 527 U.S. at 639.[1]

Although Title II covers a wide range of qualitatively different activities, this case involves only one category of covered issues, namely, the accessibility of public buildings. Accordingly, as explained below, the Court can choose to address the constitutionality of Congress's attempt to

[1] Because the Petitioner's brief discussed the proportionality issue at some length, this brief will focus principally on the "congruence" requirement, and on the implications of that requirement for the kind of legislative record that Congress must have to abrogate the States' sovereign immunity from private damage suits.

abrogate sovereign immunity only for that type of claim. It can thereby leave for another day the constitutionality of Title II's abrogation of sovereign immunity for such things as the accessibility of transportation equipment and the statute's more general prohibition on discrimination against the disabled. See, *e.g.*, 42 U.S.C. §§ 12142, 12143 (mandating that public transit systems be made accessible to disabled persons), 12162 (mandating that intercity rail transportation be made accessible to disabled persons). Such an approach would be in keeping with the Court's decision in *Garrett* to address only the constitutionality of the statute's abrogation of sovereign immunity with respect to claims under Title I, rather than addressing the constitutionality of that abrogation with respect to the entire statute. See *Garrett*, 531 U.S. at 360 n.1.

A. This Court Can Appropriately Resolve The Constitutionality Of Title II's Abrogation Of Sovereign Immunity As Applied Only To The Accessibility Of Public Buildings, And Leave For Another Day The Constitutionality Of Abrogating Sovereign Immunity From Suits For Other Alleged Violations Of Title II.

Although Petitioner makes a compelling case that Title II's abrogation of sovereign immunity is invalid in its entirety, several considerations support a category-by-category approach to addressing the constitutionality of Title II's various abrogations of sovereign immunity. Whereas Title I deals exclusively with a single activity – employment – Title II encompasses a broad spectrum of distinct activities, ranging from providing transportation services to making public buildings accessible. Because the activities at issue in Title II differ qualitatively from one another, it is conceivable that Congress could have made findings that are adequate to support an abrogation of sovereign immunity with respect to one activity but not others. Conversely, congressional findings with respect to one activity cannot support the

abrogation of sovereign immunity with respect to another, qualitatively different activity.

Indeed, allowing Congress to leverage a proper finding of unconstitutional conduct in one area into a justification for abrogating sovereign immunity in another area would be flatly contrary to this Court's requirement that there be a "congruence" between valid congressional findings and the abrogation of sovereign immunity. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315 (1966) (to be congruent, a law must be "aimed at areas where [the constitutional violation] has been most flagrant"); *Nevada Dep't of Human Res.* v. *Hibbs*, 123 S. Ct. 1972, 1993 (2003) (Kennedy, J., dissenting). For example, Congress might (theoretically) find a pattern of unconstitutional activity in the provision of public transportation services, which is governed by Subtitle B, but not with respect to access to public buildings, which is governed by Subtitle A. Then, even though these two classes of activity have no apparent ground in common, Congress could – by the mere expedient of drafting a statute broad enough to embrace them both – effect an abrogation of sovereign immunity that reaches well beyond the predicate pattern of unconstitutional behavior. Such a result would plainly violate this Court's congruence requirement. Moreover, if this Court were to indicate that it will review such overly inclusive statutes *in toto* for purposes of Eleventh Amendment analysis, Congress would have an incentive to use legitimate findings of unconstitutional behavior by the States as springboards for sweeping eliminations of sovereign immunity.

That is why the Court has traditionally resisted allowing Congress broadly to abrogate sovereign immunity. For example, in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), Justice Harlan distinguished his vote to strike down a New York state literacy test from his previous vote to uphold a similar law in South Carolina. See *Hibbs*, 123 S. Ct. at 1993-94 (Kennedy, J., dissenting) (discussing Justice Harlan's

voting justifications). In *South Carolina* v. *Katzenbach*, 383 U.S. at 315-23, based on "'voluminous legislative history'" with respect to voting rights, Justice Harlan had upheld strong remedial measures, including the suspension of literacy tests. *Morgan*, 384 U.S. at 667 (Harlan, J., dissenting). In *Morgan*, however, Justice Harlan voted to invalidate a similar federal ban on New York state literacy tests based on a lack of a showing that "there ha[d] in fact been an infringement of [a] constitutional command." *Id.* Thus, in *South Carolina* v. *Katzenbach* and in *Morgan*, Justice Harlan reached different conclusions about the constitutionality of related voting activities based solely on the "congruence" between congressional findings of unconstitutionality and the activity at issue. Such a specific inquiry is necessary here as well, regardless of whether the Court addresses the entirety of Title II or limits its inquiry to the accessibility of public buildings.

This Court, moreover, has never addressed, much less upheld, the abrogation of the States' sovereign immunity for a statute as broad as Title II of the ADA. In previous cases the Court has addressed the abrogation issue in limited activities, such as voting preclearance (*City of Rome* v. *United States*, 446 U.S. 156 (1980); *Gatson County* v. *United States*, 395 U.S. 285 (1969); *South Carolia* v. *Katzenbach*, 383 U.S. 301 (1966)), religious exemptions (*City of Boerne* v. *Flores*, 521 U.S. 507 (1997)), employment discrimination (*Board of Trustees* v. *Garrett*, 531 U.S. 356 (2001)), Indian gaming (*Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44 (1996)), patent infringement (*Florida Prepaid*, 527 U.S. at 640), and employment family leave (*Nevada Dep't of Human Res.* v. *Hibbs*, 123 S.Ct. 1972 (2003)). As in these previous cases, an activity-by-activity review under Title II makes sense because it allows an appropriately particularized examination of the Congressional record for each activity. Otherwise, Congress would be able to abrogate sovereign immunity for actions lacking any pattern of discrimination simply by including

them in same legislation as unrelated activities for which a pattern of discrimination exists.

Finally, category-by-category review of Title II's various abrogations of sovereign immunity also furthers the doctrines of constitutional avoidance and separation of powers. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944). But broad-brush review of the entire Title II scheme would require courts to ratify (or not to ratify) the constitutionality of all of the immunity-abrogating provisions in the Title, thereby addressing a broader range of constitutional questions than necessary to resolve a particular case.[2]

To be sure, the Court is free to take the contrary approach and to decide, once and for all, whether Title II validly abrogates the States' sovereign immunity as to any and all of the activities that fall within the statute's scope. Indeed, the reasons why Title II does not validly abrogate a State's sovereign immunity as to the accessibility of public buildings may also compel the conclusion that Congress exceeded its authority in abrogating sovereign immunity as to other categories of activities. But the Court is not compelled to reach that question in this case, any more than it was compelled in *Garrett* to address the abrogation of sovereign

---

[2] For these reasons, at least two circuits have examined the constitutionality of Title II's abrogation of sovereign immunity on a category-by-category basis, rather than examining the entire statutory scheme *in toto*. *See Brown* v. *North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 703-04 (4th Cir. 1999) (noting that an examination of Title II's provisions separately advances doctrine of constitutional avoidance and examination of the entire Title *in toto* is "fundamentally at odds with separation of powers values"); *Alsbrook* v. *City of Maumelle*, 184 F.3d 999, 1006-07 (8th Cir. 1999) (declining to examine statute as whole for Section 5 inquiry based on doctrine of constitutional avoidance).

immunity with respect to claims other than those arising under Title I.

B. While Unfortunate, The Failure To Outfit Courthouses And Other Public Buildings So That Persons Of All Disabilities May Access Them Without Assistance Violates Neither Due Process Nor Equal Protection.

Category-specific analysis of Title II's abrogations of sovereign immunity also facilitates analysis of the first inquiry required by *Boerne* and *Garrett*, namely, to "identify with some precision the scope of the constitutional right at issue." See *Garrett*, 531 U.S. at 365. This analysis, moreover, must reflect the reality that "[t]he ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch." *Hibbs*, 123 S.Ct. at 1977 (quoting *Kimel*, 528 U.S. at 81).

Here, the plaintiffs have alleged two constitutional rights: the right to be free from invidious discrimination prohibited by the Equal Protection Clause, and a due process right to attend court proceedings. As shown below, under this Court's decisions, neither of these theories creates a general constitutional right to unassisted access to public buildings or to specific portions of public buildings.

1. A State's Rational, if Unfortunate, Decision Not to Make Public Buildings Fully Accessible to Persons of All Disabilities Does Not Constitute an Equal Protection Violation.

In the equal protection context, this Court in *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985), rejected the argument that classifications based on disability are subject to heightened scrutiny. Instead, regulations concerning the disabled as a class are entitled only to rationality review. *Garrett*, 531 U.S. at 367. Accordingly, they "cannot run afoul of the Equal Protection Clause if there

is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller* v. *Doe*, 509 U.S. 312, 320 (1993).

But that, of course, means that the Equal Protection Clause of the Fourteenth Amendment does *not* require States to make special accommodations for the disabled, provided their actions toward the disabled are rational. See *Garrett*, 531 at 364. Thus, as the Court observed in *Garrett*, "[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." *Id.* at 368. In other words, a State does not run afoul of the Equal Protection Clause by failing to accommodate the disabled, so long as it has a rational basis for doing so. *Id.* at 367.

It follows from this analysis that the real constitutional right at issue here is the right to be free from a failure by the States, without a *rational* basis, to make special accommodation for the disabled with respect to accessibility of public buildings. But a State might have numerous rational reasons for failing to make public buildings fully accessible to persons of all disabilities. Chief among these is that, faced with limited resources, a State may rationally choose to fund other priorities, such as college scholarships for the disabled, or even compliance with other requirements imposed by the ADA. Whether these decisions are right or wrong as a matter of policy, they plainly would not constitute a constitutional violation under the deferential rational basis standard.

This conclusion is illustrated by the facts of this case. Neither of the plaintiffs has alleged, much less demonstrated, that the State of Tennessee lacked a rational basis in failing to make the public buildings at issue here accessible. Nor could such a showing be made: The buildings at issue were constructed before the Second World War, at a time when wheelchair ramps were virtually unknown and elevators were uncommon in small buildings. And even after this technology became more widely available and cost-efficient,

the State would have been required to spend substantial sums to retrofit the old buildings. Given other budgetary needs, the State's decision not to spend these sums was surely rational, even if most would agree it was bad policy.

2. A State Does Not Offend Due Process by Failing to Provide Unassisted Access to Courthouses, Because There Is No Absolute Right to Unassisted Attendance at Court Proceedings.

Respondents also claim that the alleged denial of ready access to the courthouse violates their due process rights. Thus, Respondents may argue that – at least as applied to public courthouses – Title II's abrogation of sovereign immunity is justified under the Due Process Clause of the Fourteenth Amendment. Determining whether that is true requires the Court to locate the contours of the due process right to be present at court proceedings.

First, there is no due process right to be present at a court proceeding in which one may have a pecuniary interest but to which one is not a party. This Court has never recognized such a broad right, and *amici* are aware of no lower federal court to have done so.[3] Thus, the abrogation of the States' sovereign immunity cannot be justified on the theory that a

---

[3] *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), in which this Court held that the general public had a right to access a criminal trial, is inapplicable here. First, that case concerned only the guarantee (derived from the Free Speech Clause) of a "public trial" in general; it did not recognize an individualized personal right to attend trial. *Id.* at 571-74; *see also id.* at 584-85 (Brennan, J., concurring). Second, even as to that generalized public "right," *Richmond Newspapers* conferred only rational basis scrutiny. *See id.* at 583 (Stevens, J., concurring) (First Amendment prohibits "arbitrary interference with access to important information"); *id.* at 588 (Brennan, J., concurring). Finally, *Richmond Newspapers* involved only the State's power to close criminal trials to the public, and did not address civil trials. *See id.* at 580 n.17.

State's failure to make a public courthouse or other public building accessible to the disabled will violate due process by denying people like Respondent Jones an opportunity to ply their trade as court reporters. See Pet. App. 19-20.

Second, even as to parties in legal proceedings, there is no absolute right to attendance. To be sure, a criminal defendant generally has a due process right (stemming from the Sixth Amendment's Confrontation Clause) to be present in a criminal proceeding against him. See *Illinois* v. *Allen*, 397 U.S. 337, 338 (1970) (citing *Lewis* v. *United States*, 146 U.S. 370 (1892)). And indigent citizens have a due process right to be free of filing fees and other costs that would otherwise preclude their access to the courts. See *Boddie* v. *Connecticut*, 401 U.S. 371, 375-76 (1971).

It is well settled, however, that even these limited rights of access are subject to numerous exceptions. For example, as this Court has made clear, the notion that a "trial can never continue in the defendant's absence [has] been expressly rejected." *Allen*, 397 U.S. at 342 (citing *Diaz* v. *United States*, 223 U.S. 442 (1912)); see, *e.g.*, *id.* at 343-44 (recognizing at least three constitutionally permissible ways to exclude the defendant from the courtroom without violating his due process right to be present); *Snyder* v. *Massachusetts*, 291 U.S. 97, 118-20 (1934) (the right to be present may be lost); *Boddie*, 401 U.S. at 382 (right to judicial access is limited); cf. Fed. R. Crim. P. 43(b) (providing numerous instances in which presence of a defendant in criminal proceeding not required).

Maryland v. *Craig*, 497 U.S. 836 (1990), is illustrative. There, the Court held that denial of the opportunity to confront a witness did not violate a criminal defendant's due process rights where the State afforded him an alternate means to see the witness. *Id.* at 849-50. In so holding, the Court weighed public interest considerations against a defendant's right to be present. It concluded that the right to confront may be satisfied without a face-to-face confrontation

where denial of such confrontation is necessary to further an important public policy and where the testimony's reliability is otherwise assured. *Id.* at 850. As Justice O'Connor wrote for the Court, "our precedents establish that 'the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial.'" *Id.* at 849 (emphasis in original) (quoting *Ohio* v. *Roberts*, 448 U.S. 56, 63 (1980)). Thus, where the State has an important policy interest, the preference for a defendant's face-to-face confrontation at trial can be overridden so long as alternate means exist to satisfy a defendant's right to confrontation.

Third, even if there were an absolute right to be present in a court proceeding, that is not the same thing as a right to be present *without assistance*. In this case, for example, the State afforded Respondent Lane two alternatives reasonably calculated to facilitate his presence. It offered to hold one of the proceedings in another facility that was accessible (the courthouse library, for example), and, if necessary, to have courthouse employees assist him upstairs to the courtroom. See Pet. App. 15 & 16. Either alternative would have allowed him to attend the proceedings in question.

Given these alternatives, the fact (if it is so) that the State did not afford Mr. Lane *unassisted* access to the courthouse had no effect on his ability to confront witnesses, refute claims against him or offer evidence in his behalf. To the contrary, the State attempted conscientiously to reconcile Mr. Lane's right to be present at the proceedings and the State's need to administer those proceedings in a cost-effective manner. Tennessee, in short, did not deprive Mr. Lane of due process.

Because the Due Process Clause does not require a State to provide unassisted access to public buildings, the Clause provides no basis for abrogating the States' sovereign immunity for alleged failure to make public buildings physically "accessible" to citizens with disabilities that prevent them from doing such things as climbing stairs. At a

minimum, that is certainly true where, as here, States provide alternative means by which these citizens can attend legal proceedings in which they are parties.

C. Neither The Statutory Text Nor The Legislative Record Of Title II Contains The Requisite Findings Or Evidence Of Past Unconstitutional Conduct By The States With Respect To The Accessibility Of Public Buildings.

Even if the failure to make public buildings accessible could be a constitutional violation, neither the text of Title II nor its supporting record is adequate to support the use of Section 5 to abrogate the States' sovereign immunity for the kinds of claims at issue here. As explained above, to satisfy the congruence requirement, Congress must identify a pattern of unconstitutional conduct by the States with respect to the activity covered by the statute. See *Garrett*, 531 U.S. at 370; *City of Boerne*, 521 U.S. at 530. And it cannot impute conduct by private actors to the States. See *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 83 (2000) (plurality op.).

Here, a review of the text and legislative record reveals no support for a history or pattern of purposeful discrimination against the disabled as to the accessibility of public buildings. Nor does the record support a finding that the disabled have suffered a pattern of due process violations at the hands of the States themselves.

1. Congress Failed to Identify Any History or Pattern of Equal Protection or Due Process Violations.

a. Much of the evidence cited in support of Congress's use of its Section 5 authority in the ADA consists of findings of "discrimination" against the disabled. See generally 42 U.S.C. § 12101. However, Congress's use of that term encompasses much conduct that is perfectly constitutional. There is no indication that the invocations of that term in (or in support of) Subtitle A of Title II referred to conduct that is

arbitrary or irrational conduct – a necessary condition for an equal protection violation. As discussed above, discrimination may be unenlightened but still minimally rational.

It is beyond dispute that Congress's authority to enact general remedial legislation under Section 5 is limited to rectifying conduct that is unconstitutional, not merely undesirable. Moreover, the mere fact that Congress states that particular conduct is unconstitutional does not make it so. See *Kimel*, 528 U.S. at 80.

More specifically, as discussed above, *Cleburne* compels the conclusion that a State may take account of disabilities, or refuse to accommodate them, as long as it has a rational basis for doing so. Thus, the fact that Subtitle A of Title II refers to "discrimination" against the disabled does not mean that Congress actually found a pattern of unconstitutional conduct. There is no congruence between that finding and Title II's abrogation of sovereign immunity for claims challenging the failure to make public buildings accessible.

b. The Act's text also contains a series of "Findings" explaining why it was enacted. See 42 U.S.C. § 12101. These findings generally express concern with discrimination on the basis of disability across a broad range of services and activities, including, *inter alia*, access to public services. See *id.* § 12101(a)(3); see also *id.* § 12101(a)(5) ("individuals with disabilities continually encounter various forms of discrimination, including . . . the discriminatory effects of architectural, transportation, and communication barriers . . . failure to make modifications to existing facilities and practices . . .").

Here, the findings' sweeping language reveals a congressional intent to address not only discrimination that is purposeful or irrational, and therefore unconstitutional, but also discrimination that is entirely constitutional. For example, in Title II Congress has determined that

"discrimination" shall include differentiating on the basis of "race, color, sex, national origin, religion, or age" *and* disability. 42 U.S.C. § 12101(a)(4). Yet each of these forms of discrimination is reviewed differently under the Constitution, and most of these groups – unlike the disabled – receive strict scrutiny review as suspect classifications.

Again, discrimination on the basis of disability is subject to rationality review. And there are a host of rational, if debatable, reasons a State may choose not to take such actions. Thus, in asking this Court to treat Congress's finding of "discrimination" as a finding of unconstitutional conduct, then, respondents are effectively asking this Court to overrule *Cleburne* and treat disability as a suspect classification. Once again, there is no congruence between the findings and the abrogation of sovereign immunity to accessibility claims.

c. Nor does the legislative record otherwise indicate a pattern of unconstitutional conduct. To be sure, the *Garrett* dissent attached a list of 300 instances of alleged discriminatory treatment by state officials. *Garrett*, 531 U.S. at 370. But fewer than 20 percent of these anecdotes involve access to public buildings. And they consist entirely of such broad and nondescript statements as "inaccessible public buildings and services," "inaccessible courthouse," "inaccessible government buildings in Seward," and "inaccessible new performing arts center," *Id.* at 391-93 (Breyer, J., dissenting) (App. C). None provides sufficient factual detail to establish that the alleged denial of accessibility (if it occurred) was irrational, and therefore unconstitutional. This is especially true in light of the fact that, where rationality review applies, "the burden is on the one attacking" the government action" to negative every conceivable basis which might support it." *Heller*, 509 U.S. at 320 (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

In short, these examples are not even legislative findings, and are "so general and brief that no firm conclusion can be drawn" from them. *Id.* at 371 n.7.

d. udicial decisions likewise provide no support for a finding of widespread unconstitutional conduct. As some members of this Court have observed, evidence of a history or pattern of unconstitutional conduct on the part of the States may be found "in decisions of the courts of the States and also the courts of the United States." *Garrett*, 531 U.S. at 376 (Kennedy and O'Connor, J.J., concurring) (noting that "one would have expected to find . . . extensive litigation and discussion of the constitutional violations"). Here, however, there is a remarkable absence of judicial documentation of constitutional violations by the States against the disabled.

The dearth of lawsuits alleging unconstitutional conduct in the years immediately before Title II's enactment bolsters the conclusion that Congress did not have support for a finding of a history or pattern of unconstitutional conduct by the States. Stated differently, there is no congruence between the evidence and findings on which Congress relied, and its decision to abrogate sovereign immunity as to accessibility claims.

2. Congress Did Not Identify a Pattern of Discriminatory Conduct Attributable to the States Themselves.

In all events, it is well established that Section 5 legislation based on the unconstitutional conduct of local entities or private actors is insufficient to justify the extraordinary remedy of abrogating a State's sovereign immunity. "Just as § 1 of the Fourteenth Amendment applies only to actions committed 'under color of state law,' Congress' § 5 authority is appropriately exercised only in response to state transgressions." *Garrett*, 531 U.S. at 368 (citing *Florida Prepaid*, 527 U.S. at 640). Neither the text nor the legislative history of Title II supports the notion that the States

themselves engaged in any pattern of unconstitutional conduct.

a. As a threshold matter, the text is devoid of any mention of unconstitutional conduct attributable to the States. Instead, the statute alleges discrimination without mention of the culpable entities, instead naming "society" as being responsible for the conduct. See 42 U.S.C. § 12101(a)(2) ("historically, *society* has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities") (emphasis added). The text thus invites the conclusion that any pattern of unconstitutional conduct is a result of actions taken by private actors or local entities, not by the States.

b. Nor does the legislative record provide any support for a pattern of discriminatory conduct by the States, a fact that this Court observed in *Garrett*. See 531 U.S. at 369 (noting that "great majority of these incidents do not deal with the activities of States"). The legislative record suffers from the same shortcoming as the text in this regard: no nexus between the conduct that Subtitle A of Title II appears to treat as unconstitutional and any action on the part of the State.

Indeed, of the alleged instances of failure to make reasonable accommodations in public buildings, only a few isolated instances are even arguably attributable to the States. And those do not establish a pattern of unconstitutional conduct.

For example, in Alaska there were allegedly "inaccessible areas at [a] new Alaska Performing Arts Center." *Id.* at 392 (Breyer, J., dissenting) (App. C). But this brief description gives no information as to what areas were inaccessible, how they were inaccessible, what percentage of disabled persons could not gain access, or, most important, whether any rational reason existed for such inaccessibility.

Similarly, the record contains evidence that, in Georgia, the "University of Georgia located its office of handicapped services in inaccessible second floor office." *Id.* at 401. And in Mississippi there were allegedly "inaccessible classrooms and library at Mississippi School for the Deaf." *Id.* at 411.

But again, these anecdotes provide no indication of the extent of the inaccessibility, or whether the inaccessibility lacked a rational basis and was therefore unconstitutional. As the concurrence in *Garrett* put it, "[t]he failure of a State to revise policies now seen as incorrect under a new understanding of proper policy does not always constitute the purposeful and intentional action required to make out a violation of the Equal Protection Clause." *Id.* at 375 (Kennedy and O'Connor, JJ., concurring).

c. No other legislative findings support any unconstitutional pattern of conduct by the States themselves. The House and the Senate Reports, for example, do not mention a widespread pattern of unconstitutional discrimination on the part of the States. See S. Rep. No. 101-116, at 44 (1989); H.R. Rep. No. 101-485, pt. 4, at 24-25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 512, 513-25. To the contrary, the House Report emphasized that the legislation was needed, not to address the conduct of the States, but because existing disability laws "do[] not apply to *private* sector entities that do not receive Federal funds." H.R. Rep. No. 101-485, pt. 4. at 24), *reprinted in* 1990 U.S.C.C.A.N. at 513 (emphasis added).

Indeed, many legislators congratulated the States on their leadership in protecting the rights of disabled individuals. See S. Rep. No. 101-116, at 92, 96 (Statement of Sen. Hatch). And others confirmed that, as described at greater length below, that many States' protection of the disabled was equal to, if not greater than, the ADA's. See 136 Cong. Rec. H2614 (daily ed. May 22, 1990) (Rep. Berman). Thus, the legislative findings suggest that, if anything, the States have

proactively protected the disabled, rather than unconstitutionally disregarded them.

* * * *

Because the legislative record neither attributes any history or pattern of unconstitutional conduct to the States *themselves* nor establishes support for the existence of such a history or pattern, Congress has exceeded its Section 5 authority to the extent it attempted to abrogate the States' sovereign immunity for failure to make public buildings accessible. There is, in short, no "congruence" between the findings and evidence in the legislative record and Congress's decision to abrogate the States' immunity as to that class of claims.

II. AS A PRACTICAL MATTER, THERE IS NO GOOD REASON TO ALLOW PRIVATE FEDERAL DAMAGE ACTIONS BASED ON THE ACCESSIBILITY OF PUBLIC BUILDINGS OWNED OR USED BY STATE GOVERNMENTS.

Abrogating the States' sovereign immunity with respect to accessibility claims is also unnecessary from a practical standpoint. As shown below, virtually every State in the nation already ensures, as a matter of State law, that the disabled have ample access to public buildings. And the ADA's provisions for injunctive relief and federal enforcement actions – assuming Title II is valid Commerce Clause legislation – afford more than adequate reinforcement.

A. Virtually Every State Already Has Statutes Or Regulations Requiring That Public Buildings Be Accessible To The Disabled.

As this Court observed in *Garrett*, "by the time that Congress enacted the ADA in 1990, every State in the Union had enacted" measures proscribing discrimination against the disabled. 531 U.S. at 368 n.5. This beneficent trend has continued since the ADA's passage, with a number of States adding new protections and strengthened existing remedies.

As to the accessibility of public buildings, as shown in the Appendix, virtually all States now specifically guarantee access to disabled persons.

1. Indeed, by the time the ADA was enacted, the States had already been voluntarily traveling "the path to a more decent, tolerant, progressive society." *Id.* at 375 (Kennedy, J., concurring). As the Court has observed, the States may be said largely to have charted the course. See *id.* at 368 n.5 (quoting statement of a congressional witness that the States prior to the ADA were "far out in front of the Federal Government"). Congress, then, in effect leapfrogged many State governments – and caught up with others – in creating the protections secured by the ADA.

To be sure, Congress's efforts in this regard are commendable. The ADA is, as Justices Kennedy and O'Connor termed it, "a milestone" on the road to a better society. *Id.* at 375 (Kennedy, J., joined by O'Connor, J., concurring). But Congress's awakening to the values embodied in the ADA – as to which the States, as noted, had led the way – is no warrant for the quantum step of exposing the States to private federal damages suits with respect to accessibility claims.

2. Further, such exposure would be more likely to undermine than to advance the salutary goals of both the ADA and corresponding State laws and rules. For one thing, enforcement of federal anti-discrimination law by way of private damages actions naturally tends to remove, or displace, the States' incentives to create their own such protections for their citizens. It is not advisable, in this important area of social policy, to shutter the laboratories of democracy – at least not without a strong indication that they are not doing the job. As noted above, the indications are distinctly to the contrary.

Equally important, the prospect (and before long the reality) of widespread and enormously costly damages suits

would necessarily divert the States' resources from remedial to defensive ends. Especially in view of the budget crises with which so many States are now struggling, it should go without saying that those resources are limited, indeed scarce. As this Court is well aware, there are few more voracious consumers of resources than private civil litigation.[4]

None of this is to say that existing State laws and rules fully eradicate the difficulties faced by disabled persons, or that further legislation in this area is not to be desired as a policy matter. But, as shown in the above discussion and in the attached appendix, existing State laws are sufficient to address the vast majority of accessibility problems. Moreover, they do so in a way that is tailored to meet the specific circumstances of each State's public buildings and facilities, as well as the requirements of each State's licensing and enforcement authorities.

Indeed, since the ADA's passage, several States have enacted new protections for the disabled or strengthened existing protections.[5]

---

[4] *Cf. Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 597-98 (1997) (discussing the "'objectionable aspects of asbestos litigation,'" as recounted by the ad hoc committee appointed by the Chief Justice to investigate the asbestos litigation crisis). In this regard, the magnitude of the pool of potential ADA plaintiffs should be kept in mind. The Act's definition of disability is extremely broad, embracing nearly 20 percent of Americans by Congress's own reckoning. *See* 42 U.S.C. §§ 12102(2) (defining "disability" within the meaning of the ADA), 12101(a)(1) (finding that "some 43,000,000 Americans," nearly 20 percent of the 1990 U.S. population, were disabled at the time of the ADA's passage).

[5] *See, e.g.*, Ark. Code § 19-4-1415; Fla. Stat. ch. 553.501-553.513; Ga. Code Ann. § 30-3-3; Haw. Rev. Stat. § 103-50; Ind. Code § 22-13-4-1.5; La. Rev. Stat. tit. 40 § 1734; Mo. Rev. Stat. § 213.065; Neb. Rev. Stat § 20-127; N.H. Rev. Stat § 155-A:5; N.Y. Pub. Bldgs. Law § 51; N.C. Gen. Stat. § 168-2; N.D. Cent. Code § 48-02-19; Ohio Rev. Code Ann. § 3781.111; Or. Rev. Stat. § 447.220; R.I. Gen. Laws § 37-8-15; S.D. Codified Laws § 5-14-13; Vt. Stat. Ann. tit. 21 § 273; Va. Code Ann. § 2.2-1159; Wash. Rev. Code § 70.92.110; Wis. Stat. § 101.13.

In short, a federal right of action for private damages against the States would not further, and could well hinder, the goals embodied in Title II of the ADA.

B. The Potential Availability Of Injunctions And Federal Enforcement Actions To Require Compliance With Title II Provides Ample Additional Assurances Of Accessibility.

Nor must disabled persons rely solely upon State law to ensure the accessibility of public buildings. To be sure, this Court has not yet had occasion to decide whether the other provisions of Title II are a valid exercise of Congress's Article I power as applied to the States. Assuming they are, however, the Court's evaluation of the practical necessity of a federal right of action for damages must take account of the other remedies provided by the statute. In view of those other remedies, it is clear that private damages actions are not the optimal means – indeed, are not necessary – to further the Act's goals.

1. The principal remedy, of course, is injunctive relief. See 42 U.S.C. § 12133 (incorporating by reference 42 U.S.C. § 2000e-5(g)) (providing for injunctions to enforce compliance with Title II). And injunctive relief, in virtually all conceivable circumstances, is exactly tailored to remedy the evil at which Title II is aimed: the denial or unreasonable restriction to disabled persons of access to public services and accommodations.

This case is a good example. The most natural and reasonable remedy for the discrimination that the plaintiffs claim to have suffered – denial of ready entry to public buildings – would be a court order compelling the responsible State officials to make the necessary modifications or other accommodation. Furthermore, any such order would be backed by the threat of federal enforcement to compel compliance. See *id.* § 2000e-5(i).

2. If for some reason injunctive relief were inadequate to remedy a given instance of discrimination – or if it were thought to offer insufficient incentive for compliance – the ADA also provides for federal civil enforcement actions. See *id.* § 2000e-5(f). Without offending the Eleventh Amendment, such an action could result in (among other remedies) civil penalties, as well as costs and fees.

Thus, even assuming the policies embodied in the ADA cannot be properly advanced without the threat of monetary exaction, that threat can be wielded and carried out without the drastic step of abrogating the States' sovereign immunity. Moreover, federal civil enforcement of the ADA, coupled with case-by-case injunctive enforcement, is much surer to advance the Act's policy goals in a targeted and effective manner than the cudgel of private tort suits.

CONCLUSION

For the reasons stated above, and in Petitioner's brief, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

WILLIAM H. PRYOR JR.
ATTORNEY GENERAL
NATHAN A. FORRESTER
SOLICITOR GENERAL
STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152

GENE C. SCHAERR*
RICHARD H. SINKFIELD, III
RYAN D. NELSON
KATHRYN R. HAUN
RICHARD H. MENARD JR.
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, DC 20005

JON BRUNING
ATTORNEY GENERAL
STATE OF NEBRASKA
2115 State Capitol
Lincoln, NE 68509

BRIAN SANDOVAL
ATTORNEY GENERAL
STATE OF NEVADA
100 North Capitol Street
Carson City, NV 89701

WAYNE STENEHJEM,
ATTORNEY GENERAL
STATE OF NORTH DAKOTA
State Capitol
600 E. Boulevard Ave.
Bismarck, ND 58505-0040

W.A. DREW EDMONDSON
ATTORNEY GENERAL
STATE OF OKLAHOMA
2300 North Lincoln
Boulevard, Suite 112
Oklahoma City, OK 73105

PATRICK J. CRANK
ATTORNEY GENERAL
STATE OF WYOMING
123 State Capitol
Cheyenne, WY 82002

MARK L. SHURTLEFF
ATTORNEY GENERAL
STATE OF UTAH
236 State Capitol
Salt Lake City, UT 84114

Counsel for Amici Curiae

September 8, 2003

* Counsel of Record

APPENDIX

STATE ACCOMMODATION OF THE DISABLED IN PUBLIC BUILDINGS AND FACILITIES[1]

STATE	AUTHORITY	ACCOMMODATION
Alabama	Ala. Code § 21-4-4 (2001)	Requires all public buildings and facilities under construction as of, or constructed after, October 10, 1975 to comply with accessibility standards as promulgated by the State Fire Marshal in conformity with the American National Standards Institute guidelines; granted accessibility waivers for projects in progress where compliance was impractical in light of the stage of completion.
Alaska	Alaska Stat. § 35.10.015 (2002)	Compels the Alaska Department of Public Works to adopt and enforce codes governing the construction of public buildings and facilities to ensure that they "are accessible to, and usable by, the physically handicapped ...."; after June 25, 1976, no public building or facility can be

[1] Descriptions of the statutory provisions reflect their current effective status. References to the legislative history of such provisions are meant to illustrate the duration of state legislative efforts in increasing accessibility of public buildings.

STATE	AUTHORITY	ACCOMMODATION
		designed or constructed in a manner that does not comply with the accessibility standards; requires the Department to maintain an inventory list of public buildings with respect to compliance and to develop cost estimates for retrofitting in order to establish a priority list.
Arizona	Ariz. Rev. Stat. Ann. § 41-1492.01 (2003)	Requires that "all buildings and facilities that are used by public entities and that are leased or constructed in whole or in part with the use of state or local monies" comply with Title II of the ADA; as enacted by 1992 Ariz. Sess. Laws 224 § 4.
Arkansas	Ark. Code Ann. § 19-4-1415, § 20-14-303 (1987)	Requires all public building projects that exceed five million dollars, excluding the cost of land, to comply with the ADAAG, pursuant to 2001 Ark. Acts 1626 § 1, as amended in 2003; establishes that it is the right of "[v]isually handicapped, hearing impaired, and other physically handicapped persons" to have the full use and enjoyment of "public streets, ... public buildings, public facilities, and other public places", subject to certain

STATE	AUTHORITY	ACCOMMODATION
		statutory limitations concerning feasibility; first enacted by 1973 Ark. Acts 484 § 2, as amended in 1979.
California	Cal. Gov't Code §§ 4450-4461 (2003)	Requires all public buildings, subject to certain exceptions, designed and constructed after November 13, 1968, to meet the state building code accessibility standards; requires the renovated sections of buildings built prior to the effective date to comply with the accessibility standards.
Colorado	Colo. Rev. Stat. §§ 9-5-102 to -103 (2003)	Requires public and private buildings subject to these sections to comply with the most current design criteria found in the "American National Standard for Buildings and Facilities Providing Accessibility and Usability for Physically Handicapped People"; requires public buildings designed after July 1, 1975, to comply with the standards with exceptions granted on an individual basis; applies standards to buildings under construction prior to July 1, 1976, when such buildings come under renovation or remodeling.
Connecticut	Conn. Gen.	Requires that the State

STATE	AUTHORITY	ACCOMMODATION
	Stat. § 29-269 (2002)	Building Inspector promulgate design and construction accessibility standards in "substantial compliance" with the ADA and that all public buildings "constructed or substantially renovated on or after October 1, 1977," with certain exceptions, comply with such standards; allows the State Building Inspector to approve compliance waivers.
Delaware	Del. Code Ann. tit. 16 § 9502; tit. 29 § 7301, § 7303 § 7306 (2003)	Establishes that it is the right of the "blind, the visually handicapped and otherwise physically disabled" to have the same rights "as able-bodied persons to use ... public buildings, public facilities and other public places"; establishes architectural standards for accessibility to the disabled for buildings (built by or on behalf of the State, leased fully or partially by the State or financed wholly or partially by State bonds) which, after July 13, 1979, have been constructed or altered.
Florida	Fla. Stat. ch. 553.501-553.513 (2002)	Florida Americans With Disabilities Accessibility Implementation Act, passed in 1993, adopted the ADAAG as the law of the state with

STATE	AUTHORITY	ACCOMMODATION
		respect to the minimum standards of the state building code, for the construction and renovation of public buildings.
Georgia	Ga. Code Ann. § 30-3-3 (2002)	Requires "all government buildings, public buildings, and facilities" subject to renovation or construction permits after July 1, 1979 to comply with the ADAAG; required such public buildings subject to renovation or construction between July 1, 1984 and July 1, 1995 to comply with the specified version of the American National Standard for Buildings and Facilities Providing Accessibility and Usability for Physically Handicapped People; allows for case-by-case exceptions based on a showing of impracticability.
Hawaii	Haw. Rev. Stat. § 103-50 (2002)	Requires construction and design of "public buildings, facilities, and sites" to be accessible to the disabled, in conformance with the ADAAG; first enacted by 1965 Haw. Sess. Laws 3 § 2, as amended in 1969, 1989, 1993, 1996, 1999 and 2002.
Idaho	Idaho Code § 39-4101,	Adopts the ADA and ADAAG accessibility requirements as

STATE	AUTHORITY	ACCOMMODATION
	§ 39-4109, § 56-702 (2003)	the state building code to be enforced by local authorities, pursuant to 2002 Idaho Sess. Laws 345 § 13; establishes that "the visually handicapped, hearing impaired, and other physically handicapped persons" have the same rights of use able-bodied persons to "... public buildings, public facilities, and other public places"; first enacted by 1969 Idaho Sess. Laws. 69 § 2, as amended in 1984.
Illinois	410 Ill. Comp. Stat. 25 et seq. (2002)	Requires the Capital Development Board to promulgate accessibility standards for all public buildings; stipulated that standards would apply to all newly constructed buildings and certain renovations; first enacted by 1984 Ill. Laws 948 § 1, as amended in 1991.
Indiana	Ind. Code § 22-13-4-1.5 (2003)	By act of 1994 Ind. Act 118 § 3, required the state buildings commission to adopt accessibility standards consistent with the ADAAG.
Iowa	Iowa Code § 104A.1 et seq. (2003)	Requires all public buildings under construction or to be constructed after July 4, 1965, to comply with state accessibility standards to accommodate the disabled.

STATE	AUTHORITY	ACCOMMODATION
Kansas	Kan. Stat. Ann § 58-1301 (2002)	Establishes that all existing (as of 1978) and future public buildings and facilities must comply with minimum accessibility standards, subject to certain exceptions.
Kentucky	Ky. Rev. Stat. Ann. § 198B.260 (2002)	Effective July 15, 1994, requires the Kentucky Board of Housing, Buildings and Construction to promulgate revised accessibility regulations consistent with the ADA and the ADAAG covering the renovation and construction of all buildings with certain limited exemptions (*e.g.* historical structures where the historical significance would be destroyed by compliance); application of earlier state accessibility standards were effective July 15, 1980.
Louisiana	La. Rev. Stat. Ann. § 40:1731 et seq. (2003)	Declares the legislature's intent to remove architectural barriers to the ability of the physically disabled to exercise their rights freely, as established by 1977 La. Acts 625 § 1; requires newly constructed or altered public facilities to comply with the ADAAG, as established by 1990 La. Acts 459, § 1 and 1995 La. Acts 880 § 1.

STATE	AUTHORITY	ACCOMMODATION
Maine	Me. Rev. Stat. tit. 5 § 4553, § 4593 (2003)	Defines buildings or establishments of the State, municipality or other local government as places of public accommodation; required such places that were constructed between Sept. 1, 1974 and Jan. 1, 1982 or that met certain remodeling cost thresholds to meet statutory accessibility standards that concerned walkways, entrances, lavatories, doors and parking.
Maryland	Md. Code Ann art. 83B § 6-102 as replaced by Md. Code Ann. Public Safety § 12-202 (2003)	Mandates Department of Housing and Community Development to promulgate statewide building codes to allow for accessibility by "individuals with disabilities"; such codes are enforceable by the permitting authority; accessibility provisions were first enacted in 1974 and subsequently amended in 1979, 1985, 1986, 1987, 1988 and 1991.
Massachusetts	Mass Gen. Laws. ch. 22 § 13A (2003)	Establishes an architectural access board charged with the promulgation of rules to make public buildings accessible to the handicapped; mandates that no "construction, reconstruction, alteration or remodeling of a public building," subject to certain exceptions, can occur

STATE	AUTHORITY	ACCOMMODATION
		unless it occurs in conformity with such accessibility rules; first enacted by 1967 Mass. Legis. Serv. 724 § 1, as amended in 1971, 1974, 1979, 1981, 1986, 1989, 1990 and 2002.
Michigan	Mich. Comp. laws § 125.1352 (2003)	Requires public facilities, for which construction was contracted after July 2, 1974 and public facilities for which the renovation surpasses certain load requirements, to comply with the "barrier free design requirements contained in the state construction code."
Minnesota	Minn. Stat. § 16B.61, § 256c.02 (2003)	Mandates that the Dept. of Administration implement a building code that provides for all "public buildings constructed or remodeled after July 1, 1963, to be accessible to and usable by physically handicapped persons"; establishes the right of the physically disabled to the same use and enjoyment as able-bodied persons to "public buildings, public facilities, and other public places."
Mississippi	Miss. Code Ann. § 43-6-103 (2003)	Required all existing public buildings, contracted-for and under construction, as of July 1, 1972, to have access ramps; requires all public buildings

STATE	AUTHORITY	ACCOMMODATION
		contracted-for thereafter to comply with the state building accessibility codes.
Missouri	Mo. Rev. Stat. § 213.065 (2003)	Makes it an unlawful discriminatory practice to withhold from the disabled any of the "advantages, facilities, services, or privileges made available" in any public facility owned or operated by or on behalf of the state or a public corporation and any facility supported by public funds; first enacted by 1986 Mo. Laws 513, as amended in 1992 and 1998.
Montana	Mont. Code Ann. § 50-60-201 (2002)	Establishes a state-wide building code for "newly constructed public buildings and "certain altered public buildings" to ensure uniformity in access to persons with disabilities; first enacted by 1969 Mont. Laws 366 § 7.
Nebraska	Neb. Rev. Stat § 81-5147 (2003)	Establishes the right of the physically disabled to the same use and enjoyment as able-bodied persons to public buildings and public facilities; requires promulgation of building code regulations for newly constructed or renovated buildings that are consistent with the "guidelines and standards"

STATE	AUTHORITY	ACCOMMODATION
		of the ADA; enacted by 1998 Neb. Laws 1073, effective April 1, 1998, operative October 1, 1998.
Nevada	Nev. Rev. Stat. § 338.180 (2003)	Declares the intent of the Legislature to make public buildings designed after July 1, 1973, accessible to the disabled; requires all plans, designs and construction of public buildings after July 1, 1973, to comply with the applicable requirements of the ADA and the ADAAG; provides for a non-compliance remedy to private individuals through the attorney general, who may bring suit against the offending state entity.
New Hampshire	N.H. Rev. Stat Ann. § 155-A:5 (2002)	Requires all new buildings constructed by the State to accommodate persons with disabilities with respect to egress and ingress to public areas of such buildings; effective September 14, 2002, as enacted by 2002 N.H. Laws 8:3.
New Jersey	N.J. Rev. Stat. § 52:32-4, 5 (2003)	Requires that "[e]xcept as otherwise provided by law, all plans and specifications for the construction or remodeling of any public building" in New Jersey shall provide facilities for the disabled; mandates

STATE	AUTHORITY	ACCOMMODATION
		promulgation of regulation that prescribe the types of facilities and stipulates that such facilities shall differentiate between "small public buildings" and "large public buildings" as determined by certain square footage thresholds; the earliest version of these provisions was enacted in 1971.
New Mexico	N.M. Stat. Ann. § 28-7-3 (2003)	Establishes the right of the physically disabled to the same use and enjoyment as able-bodied persons to "public buildings, public facilities, and other public places"; first enacted by 1967 N.M. Laws 232 § 3.
New York	N.Y. Pub. Bldgs. Law § 51 (2003)	Requires that the construction, renovation or alteration of all public buildings conform to the state building codes pertinent to access for the disabled; first enacted by 1972 N.Y. Laws 656, as amended in 1974, 1984 and 1994.
North Carolina	N.C. Gen. Stat. § 168-2, § 168A-7 (2003)	Establishes the right of the physically disabled to the same use and enjoyment as able-bodied persons to "public buildings, public facilities, and all other buildings and facilities"; makes it unlawful for a state agency "to refuse to

STATE	AUTHORITY	ACCOMMODATION
		provide reasonable aids and adaptations necessary for a known qualified person with a disability to use or benefit from existing public services operated by such entity; provided that the aids and adaptations do not impose an undue hardship on the entity involved"; first enacted by 1973 N.C. Sess. Laws 493 § 1, as amended in 1991 and 1997.
North Dakota	N.D. Cent. Code § 48-02-19 (2003)	Requires a certificate of compliance with the ADAAG to accompany designs of public buildings; first enacted by 1973 N.D. Laws 376, as amended in 1975, 1977, 1979, 1983, 1989, 1991, and 1993.
Ohio	Ohio Rev. Code Ann. § 3781.111 (2003)	Requires that the board of building standards adopt accessibility standards for all buildings, including public buildings, that are consistent with the ADA; the earliest version of these provisions was enacted in 1965.
Oklahoma	Okla. Stat. tit. 61 § 11 (2002)	Requires all plans for the construction of public buildings, after May 24, 1973, to provide facilities for the "handicapped" in compliance with state building code; requires all existing public build-

STATE	AUTHORITY	ACCOMMODATION
		ings that surpass certain renovation or addition thresholds to comply with the same accessibility standards.
Oregon	Or. Rev. Stat. § 447.210 et seq. (2001)	Establishes minimum accessibility standards for the disabled in public buildings and places, consistent with the ADA; first enacted by 1971 Or. Laws 230 § 2, as amended in 1973, 1975, 1979, 1987, 1989, 1991, 1993 and 1995.
Pennsylvania	71 Pa. Stat. Ann. § 1455.1 (2003)	Requires all newly constructed public buildings to be "accessible to and usable by persons with physical handicaps"; provides that as public buildings are renovated, they shall also comply with the same standards, subject to variances based on practicability; first enacted by 71 Pa. Const. Stat. §§ 1455.3b (1965).
Rhode Isiand	R.I. Gen. Laws § 37-8-15 (2002)	Requires that the design of all public buildings be made accessible to and usable by persons with disabilities in compliance with Title 23, Ch. 27.3 of the Rhode Island Building Code; first enacted by 1964 R.I. Pub. Laws 189 § 1, as amended in 1978 and 1997.
South Carolina	S.C. Code Ann.	Establishes the legislature's intent that persons with

STATE	AUTHORITY	ACCOMMODATION
	§ 10-5-210 et seq. (2002)	disabilities participate fully in society, including the enjoyment of public facilities and buildings; requires the construction and design of public buildings to comply with revised state building codes (compliant with the American National Standards Institute guidelines), except to the extent that such buildings are exempted under federal law; first enacted by 1962 Code § 1-49, as amended in 1974 and 2000.
South Dakota	S.D. Codified Laws § 5-14-13 (2003)	Establishes the ADAAG as the minimum standards for construction to accommodate the physically disabled in public buildings; first enacted by 1965 S.D. Laws 312 § 2, as amended in 1988 and 1994.
Tennessee	Tenn. Code Ann. § 68-120-204 (2003)	Requires any public building "which is constructed, enlarged, or substantially altered or repaired after July 1, 1983" to be designed and constructed in a manner that meets the minimum standards set forth by ANSI.
Texas	Tex. Rev. Civ. Stat. Ann. art. 9102	Requires the state Department of Licensing and Regulation to adopt accessibility standards consistent with ANSI guide-

STATE	AUTHORITY	ACCOMMODATION
	(2003)	lines; mandates that all public buildings, "constructed, or renovated, modified, or altered, in whole or in part on or after January 1, 1970" with the use of public funds, must comply with the revised accessibility codes; allows waivers based on impracticability.
Utah	Utah Code Ann. § 26-29-1 et seq. (2003)	Establishes minimum accessibility standards for all public buildings and facilities that are newly constructed or remodeled with state funds, provided that the extent of compliance in the entire building may vary according to whether most or part of it is subject to renovation; first enacted by 1981 Utah Laws 126 § 28, as amended in 2001.
Vermont	Vt. Stat. Ann. tit. 21 § 273 (2003)	Requires the construction and alteration of all public buildings, including private buildings to be used as public buildings, to conform with the standards of the ADAAG, unless modified by Vermont law; effective June 21, 1988, pursuant to Vt. Acts & Resolves 268 § 5, as amended in 1989 and 1995.
Virginia	Va. Code Ann.	Requires the Department of General Services to establish

STATE	AUTHORITY	ACCOMMODATION
	§ 2.2-1159 (2003)	accessibility standards for buildings that are constructed in whole or in part with public funds; except that local authorities are charged with establishing standards for buildings constructed in whole or in part with local funds; first enacted by 1970 Va. Acts. ch. 539, as amended in 1972, 1977, 1993 and 2001.
Washington	Wash. Rev. Code § 19.27.031, § 70.92.110 (2003)	Requires all public buildings, with certain exceptions, that are constructed or remodeled after July 1, 1976, to comply with minimum accessibility standards, as now defined in the 1994 Uniform Building Code; allowed buildings contracted-for, prior to July 1, 1976 to be exempt from compliance, subject to subsequent renovation.
West Virginia	W. Va. Code § 5-15-4 (2003)	Establishes the right of the disabled to the same use and enjoyment as able-bodied persons to "public buildings, public facilities, and other public places"; the earliest version of these provisions was enacted in 1969.
Wisconsin	Wis. Stat. § 13.48(25t) § 101.13 et	Establishes a program to fund the repair and renovation of state-owned buildings, inclu-

STATE	AUTHORITY	ACCOMMODATION
	seq. (2003)	ding disability access retrofitting; requires the establishment of minimum standards to "facilitate the use of public buildings ... by physically disabled persons"; requires design and construction standards consistent with the American Standard Specifications for Making Buildings and Facilities Accessible to and Usable by the Physically Handicapped; first enacted by 1971 Wis. Laws 228 §§ 17, 42, 44, as amended in 1973, 1975, 1977, 1981, 1983, 1987, 1993 and 1995.
Wyoming	Wyo. Stat. Ann. § 16-6-501, § 16-6-502 (2003)	Requires the design and new construction or additions to "all buildings for general public use built by the state" to comply with standards set forth in the American Standard Specifications for Making Buildings and Facilities Accessible to and Usable by the Physically Handicapped; mandates the state fire marshal to review all such plans for approval; first enacted by 1969 Wyo. Sess. Laws 30 § 1, as amended in 1975, 1977 and 1982

Supreme Court, U.S.
FILED
NOV 12 2003
OFFICE OF THE CLERK

No. 02-1667

In The
Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

GEORGE LANE, BEVERLY JONES AND UNITED STATES OF AMERICA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE HONORABLE DICK THORNBURGH AND THE NATIONAL ORGANIZATION ON DISABILITY, THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, AND ADA WATCH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

*ARLENE B. MAYERSON, ESQUIRE
SILVIA YEE, ESQUIRE
DISABILITY RIGHTS EDUCATION AND DEFENSE FUND
2212 Sixth Street
Berkeley, CA 94710
Telephone: (510) 644-2555
**Counsel Of Record*

CLAUDIA CENTER, ESQUIRE
LEWIS BOSSING, ESQUIRE
ELIZABETH KRISTEN, ESQUIRE
THE LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER
600 Harrison Street, Suite 120
San Francisco, CA 94107
Telephone: (415) 864-8848

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

44 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION	1
ARGUMENT	4
I. TITLE II OF THE ADA IS BEGINNING TO ALLOW PERSONS WITH DISABILITIES TO PARTICIPATE IN PUBLIC LIFE	5
A. Accessibility of Courts and Other Government Buildings	7
B. Voting Accessibility	12
C. Community Integration	15
D. Public Transportation	19
II. THE SCOPE OF REMEDIAL RELIEF AVAILABLE FURTHER CONFIRMS THE PROPORTIONALITY OF CONGRESS'S REMEDIES	22
III. THE CONTRIBUTIONS OF THE ADA ARE THREATENED BY SOME STATES' ONGOING AND BROAD-BASED CONSTITUTIONAL CHALLENGES TO ITS VALIDITY	24
CONCLUSION	27
Appendix – BIOGRAPHIES OF *AMICI CURIAE*	1a

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Amos v. Maryland Dept. of Public Safety & Corr. Servs., 178 F.3d 212 (4th Cir. 1999), *vacated for reh'g en banc, subsequently dismissed pursuant to settlement*, 205 F.3d 687 (4th Cir. 2000) 26

Armstrong v. Davis, 275 F.3d 849 (9th Cir. 2001), *cert. denied*, 123 S. Ct. 72 (2002) 9

Barnes v. Gorman, ___ U.S. ___, 122 S. Ct. 2097 (2002).....12, 26

Barthelemy v. Louisiana Dept. of Health & Hosp., No. Civ.A. 00-1083, 2003 WL 1733534 (E.D. La. Mar. 31, 2003) 18

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).....12

Board of Trs. v. Garrett, 531 U.S. 356 (2001).....4, 26

Callahan v. City of Philadelphia, 207 F.3d 668 (3d Cir. 2000)..... 6

Chisolm v. McManimon, 275 F.3d 315 (3d Cir. 2001) 6

City of Boerne v. Flores, 521 U.S. 507 (1997) 4, 5

Delano-Pyle v. Victoria County, Tex., 302 F.3d 567 (5th Cir. 2002) 23

Doe v. Roe, 156 F. Supp. 2d 35 (D. Me. 2001).....12

Douglas v. California Dep't of Youth Auth., 271 F.3d 812 (9th Cir. 2001), *reh'g en banc denied*, 285 F.3d 1226 (9th Cir. 2002).....26

Ex Parte Young, 209 U.S. 123 (1908).....25

Feary v. Reg'l Transit Auth., 685 F. Supp. 137 (E.D. La. 1988)..... 6

TABLE OF AUTHORITIES – Continued

Page

Ferguson v. City of Phoenix, 157 F.3d 668 (9th Cir. 1998).....23, 24

Galloway v. Superior Court, 816 F. Supp. 12 (D.D.C. 1993)..... 9

Garrett v. Bd. of Trs. of the Univ. of Alabama, 344 F.3d 1288 (11th Cir. 2003).....5, 25, 26

Garcia v. SUNY Health Sci. Ctr. of Brooklyn, 280 F.3d 98 (2d Cir. 2001).....23, 24, 27

Gebser v. Lago Vista Independent School Dist., 524 U.S. 274 (1989).....24

Henrietta D. v. Bloomberg, 331 F.3d 261 (2d Cir. 2003).....25

Hicks v. Armstrong, 116 F. Supp. 2d 287 (D. Conn. 1999).....26

Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000), *cert. denied sub nom. Arkansas Dep't of Educ. v. Jim C.*, 533 U.S. 949 (2001).....27

Kelly v. Municipal Courts, 97 F.3d 902 (7th Cir. 1996)..... 6

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) 4

Koslow v. Pennsylvania Dep't of Corr., 302 F.3d 161 (3d Cir. 2002).....26, 27

Layton v. Elder, 143 F.3d 469 (8th Cir. 1998).....11

Lovell v. Chandler, 303 F.3d 1039 (9th Cir. 2002), *cert. denied*, 2003 WL 95557 (Jan. 13, 2003).....27

Matthews v. Jefferson, 29 F. Supp. 2d 525 (W.D. Ark. 1998).....11

TABLE OF AUTHORITIES – Continued

Page

Morris v. Washington Metro. Area Transit Auth., 781 F.2d 218 (D.C. Cir. 1986) 6

Nihiser v. Ohio Env'tl Prot. Agency, 269 F.3d 626 (6th Cir. 2001) 26

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999) 15, 16, 17, 18, 19

Pace v. Bogalusa City School Bd., 325 F.3d 609, *reh'g en banc granted*, 339 F.3d 348 (5th Cir. 2003) 26

Panzardi-Santiago v. Univ. of Puerto Rico, 200 F. Supp. 2d 1 (D. P.R. 2002) 23

Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998) 26

Pierce v. King, 918 F. Supp. 932 (E.D. N.C. 1996) 26

Popovich v. Cuyahoga County Ct. of Comm. Pl., 276 F.3d 808 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 72 (2002) 6, 9

Powers v. MJB Acquisition Corp., 184 F.3d 1147 (10th Cir. 1999) 23

Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989) 23

Robinson v. Kansas, 295 F.3d 1183 (10th Cir. 2002) 26

Rolland v. Cellucci, 198 F. Supp. 2d 25 (D. Mass. 2002) 18

Romer v. Evans, 517 U.S. 620 (1996) 5, 7

Saunders v. Horn, 959 F. Supp. 689 (E.D. Penn. 1996) 26

TABLE OF AUTHORITIES – Continued

Page

Shepard v. Irving, No. 02-1712, 2003 WL 21977963 (4th Cir. Aug. 20, 2003) 26

South Dakota v. Dole, 483 U.S. 203 (1987) 27

Stanley v. Litscher, 213 F.3d 340 (7th Cir. 2000) 27

Staples v. Virginia Dep't of Corrs., 904 F. Supp. 487 (E.D. Va. 1995), *cert. denied*, 116 S. Ct. 772 (1996) 26

Thompson v. Colorado, 278 F.3d 1020 (10th Cir. 2001) 25

United States v. Lopez, 514 U.S. 549 (1995) 26

Wood v. President and Trs. of Spring Hill Coll., 978 F.2d 1214 (11th Cir. 1992) 23

STATE CASES

People v. Caldwell, 603 N.Y.S.2d 713 (N.Y. Crim. Ct. 1993) 9

FEDERAL STATUTES

29 U.S.C. § 794 (Rehabilitation Act of 1973 § 504) 26, 27

42 U.S.C. § 12101(a)(2) 15

42 U.S.C. § 12101(a)(3) 15

42 U.S.C. § 12101(a)(5) 15

42 U.S.C. § 12101(a)(9) 27

42 U.S.C. §§ 12131-12134 22

42 U.S.C. § 12133 24

42 U.S.C. § 12142(a)-(c) 21

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

28 C.F.R. § 35.105(a) 9, 22
28 C.F.R. § 35.130 22
28 C.F.R. § 35.150(a) 22
28 C.F.R. § 35.150(b)(1) 22
28 C.F.R. § 35.151(a) 22

LEGISLATIVE MATERIALS

Americans with Disabilities Act: Hearings before the Subcommittee on Surface Transportation of the Committee on Public Works and Transportation on H.R. 2273, 101st Cong. 56 (1989) 20
135 Cong. Rec. S10753 (1989) 13
136 Cong. Rec. 17,296-97 (1990) 3
136 Cong. Rec. 17,376 (1990) 3, 19
S. Rep. No. 101-116 (1989) 13

STATE STATUTES AND RULES

Cal. R. Ct. 989.3 10
Cal. R. Ct. 989.3(a) 10

PLEADINGS

Defendant's Motion to Dismiss in *McCarthy v. Gilbert*, Civil Action No. 02-CV-600 (E.D. Tex., Beaumont Division) 25
Brief of Appellees in *Meyers v. State of Texas*, Case No. 02-50452 (5th Cir.) 25

TABLE OF AUTHORITIES – Continued

Page

SECONDARY SOURCES

American Association of People with Disabilities, *New GAO Report Shows Disabled are Denied Voting Access* (2001) 14
American Bar Association & the National Judicial College, *Court-Related Needs of the Elderly and Persons with Disabilities, Recommendations of the February 1991 Conference* (1991) 8
American Bar Association Commission on Mental and Physical Disability Law, *Disability Law and Policy: A Collective Vision* 50 (1999) 10
Center for an Accessible Society, *8 out of 10 Polling Sites have Access Barriers, Says GAO Report* (2001) 13
Duren Cheek, *Lawmaker Pleads for Home-care Funds for Elderly*, Tennessean.com, May 19, 2000 17
Coalition for Accessible Political Elections (CAPE), *Report of the National Voter Independence Project* 12, 13
Ernest J. Comer, *Implementation of the Americans with Disabilities Act in the New Jersey Judicial System* (National Center for State Courts 2002) 10, 11
Comm'n on the Future of the Tennessee Judicial System, *Final Report* (1996) 7
Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393 (1991) 3
Sharon Davis, et al., The Arc, *A Status Report to the Nation on People with Mental Retardation Waiting for Community Services* (1997) 16

TABLE OF AUTHORITIES – Continued

Page

Theresia Degener, *Disability Discrimination Law: A Global Comparative Approach*, 2 (Paper presented at Disability Rights in Europe: From Theory to Practice 25-26 September 2003, University of Leeds) 2

Theresia Degener & Gerard Quinn, *A Survey of International, Comparative and Regional Disability Law Reform*, in *Disability Rights Law and Policy: International and National Perspectives* 3 (M. Breslin & S. Yee, eds., 2002) 2

Jeanne Dooley & Erica Wood, *Opening the Courthouse Door: The Americans with Disabilities Act's Impact on the Courts*, 76 Judicature 39 (1992) 8

Wendy Fox-Grage et al., *The States' Response to the* Olmstead *Decision: A Work in Progress* (2002) 17

Keri K. Gould, *And Equal Participation for All . . . The Americans with Disabilities Act in the Courtroom*, 8 J.L. & Health 123 (1994) 8

Governor's Comm. on Disability Issues and Employment Civil and Legal Rights Subcomm., *Interim Court and Courthouse Access Project* (2000) 10

James C. Harrington, *Pencils Within Reach and A Walkman or Two: Making the Secret Ballot Available to Voters Who are Blind or Have Other Physical Disabilities*, 4 Tex. F. on C.L. & C.R. 87 (1999) 14

Home and Community-Based Services and Consumer-Directed Care Commission, *Working Plan of the Home and Community-Based Services and Consumer-Directed Care Commission* 18, 19

TABLE OF AUTHORITIES – Continued

Page

Thomas W. Johnson et al., *Ohio Access for People with Disabilities, Final Report to Governor Taft* (2001) 18

Maryann Jones, *And Access For All: Accommodating Individuals with Disabilities in the California Courts*, 32 U.S.F. L. Rev. 75 (1997) 9

Judicial Council of California's Advisory Comm. on Access and Fairness in the Courts, Access for Persons with Disabilities Subcommittee, *Summary of Survey and Public Hearing Reports of the Access for Persons with Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee* (1997) 9, 10

Judicial Council of California, *Fact Sheet: Access and Fairness* (June 2003) 10

Judicial Council of California, *Programs: Access and Fairness* (2003) 10

Phyllis S. Launius, *Removing Public Access Barriers to the Courts in the New Millennium: A Sampling and Analysis of Missouri's Trial Courts* (2000) 10

National Council on Disability, *Equality of Opportunity: The Making of the Americans with Disabilities Act* (1997) 28

National Council on Disability, *Inclusive Federal Election Reform* (March 15, 2001) 12, 13

National Council on Disability, *Olmstead: Reclaiming Institutionalized Lives* (2003) 16, 17, 18

National Council on Disability, *Voices of Freedom: America Speaks Out on the ADA* (1995) 6, 7, 11

TABLE OF AUTHORITIES – Continued

Page

David Pfeiffer & Joan Finn, *Survey Shows State, Territorial, Local Public Officials Implementing ADA*, 19 Mental & Physical Disability L. Rep. 537 (1995) 22

Kay Schriner et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 Berkeley J. Emp. & Lab. L. 437 (2000) 12

Rosalyn M. Simon, Status of Transportation Accessibility in the United States: Impact of the Americans with Disabilities Act, in Proceedings of Seminar Held at the Planning and Transportation Research and Computation European Transport Forum, Brunel University, England § 1.2 (Sept. 2-6, 1996) 20, 21

Gary A. Smith, *Status Report: Litigation Concerning Medical Services for Persons with Developmental Disabilities* (2002) 18

Alexandra Stewart et al., *Implementing Community Integration: A review of State* Olmstead *Plans* (2002) 17

U.S. Dep't of Justice, Disability Rights Section, *Enforcing the ADA: Looking Back on a Decade of Progress* (2000) 6

U.S. Dep't of Justice, *Project Civic Access* (2003) 11

U.S. Dep't of Justice, *Settlement Agreement between the U.S. and Hancock County, Mississippi* (2003) 11

U.S. Dep't of Justice, *Final Settlement Agreement between the U.S. and Metropolitan Government of Nashville and Davidson County, Tennessee* (2003) 11

TABLE OF AUTHORITIES – Continued

Page

U.S. Dep't of Justice, *Settlement Agreement Between the U.S. and the Santa Clara County Superior Court* (2003) 11

U.S. Dep't of Justice, *10th Anniversary of the ADA* (2000) 11

Mark Van Bever, *Implementing the Americans with Disabilities Act in a Trial Court* (2002) 11

Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 Temp. L. Rev. 387 (1991) 3

Letter from Timothy M. Westmoreland, Director of Center for Medicaid and State Operations at the Health Care Financing Administration & Thomas Perez, Director of the Office for Civil Rights at the Department of Health and Human Services to State Medicaid Directors (January 14, 2000) 16

John M. Williams, *Making Access to the Ballot Box a Snap for Disabled Voters* (1999) 15

INTEREST OF *AMICI CURIAE**

The *Amici Curiae* joining this brief include former Attorney General Dick Thornburgh, who played an instrumental role in the passage and implementation of the Americans with Disabilities Act (ADA), as well as national organizations that represent the interests of people with disabilities. The *amici* share a commitment to eradicating the debilitating obstacles faced by persons with disabilities and ensuring that persons with disabilities achieve equal access to state and local government programs and services. The *amici* have a strong interest in the effective enforcement of the ADA, and bring a unique understanding of the purpose and role of laws barring disability-based discrimination. A full recitation of their interests appears in the Appendix.

INTRODUCTION

The Americans with Disabilities Act ("ADA") has begun the process of transforming the American landscape and prevalent negative stereotypes about people with disabilities by promoting the integration of persons with disabilities into all aspects of public life.[1] By directly

---

* The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, or their counsel, made a monetary contribution to the preparation and submission of this brief.

[1] America's enactment of the landmark ADA has not only transformed American society, but also has acted as a powerful catalyst for people with disabilities all over the world who have drawn upon the law's example as they pursue legal equality in their own nations. In an unprecedented survey of international disability anti-discrimination

(Continued on following page)

addressing the state and local levels at which Americans commonly interact with their government, Title II of the ADA sought to redress exclusionary policies identified by Congress that were all the more invidious for their apparent self-justification: the less people with disabilities were seen, the more they could be assumed to be both unable and unwilling to fully participate in society.

The falseness of this twin burden of inability and disinterest cast upon people with disabilities has become self-evident in the years since the ADA has come into effect. The law's successes in increasing the accessibility of public transportation, courtrooms, voting, and higher education has begun to remedy years of state-sponsored segregation and exclusion. By allowing people with disabilities to be seen and accepted as participating members

---

provisions, authors Theresia Degener and Gerard Quinn found that over 40 countries have enacted domestic disability anti-discrimination provisions since the passage of the ADA. Theresia Degener and Gerard Quinn, *A Survey of International, Comparative and Regional Disability Law Reform*, in *Disability Rights Law and Policy: International and National Perspectives* 3 (M. Breslin & S. Yee, eds., 2002). Degener has stated that "US law has been instrumental in the evolution of disability discrimination law in many countries. Especially, the Americans with Disabilities Act (ADA) of 1990, has had such an enormous impact on foreign law development that one might feel inclined to say that the international impact of this law was larger than its domestic effect." Theresia Degener, *Disability Discrimination Law: A Global Comparative Approach*, 2 (Paper presented at Disability Rights in Europe: From Theory to Practice 25-26 September 2003, University of Leeds). This pronouncement could prove ironically true if legal protections for people with disabilities are now gutted in the very country which first enacted the law that has inspired so much international progress towards equality for people with disabilities.

of our society, the Act has dispelled prevailing myths, fears and prejudices.

While change is often gradual and there is still much left to be done, persons with disabilities are finally beginning to enjoy their rights as citizens. At the same time, fears of enormous disruption and devastating financial effects have been proven unfounded. In largest measure, this is the result of Congress's crafting of fair and reasonable provisions after extensive study and the careful balancing of interests. The ADA is the culmination of more than twenty years of fact-finding, study, and incremental legislation to address the widespread exclusion and segregation of Americans with disabilities.[2] The successes achieved through implementation of the Act, coupled with the ability of the states and other covered entities to achieve accessibility over time and without causing undue administrative or financial hardship, confirm that Congress indeed fashioned a proportionate and congruent remedy to deter and remedy historic disability-based discrimination.

---

[2] With respect to the ADA alone, Congress held fourteen hearings and sixty-three field hearings, considered innumerable studies and reports evaluating the discriminatory treatment of persons with disabilities, issued five committee reports, and engaged in prolonged floor debate. Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 393, 414 (1991). The consensus that the ADA was needed to remedy and deter historic discrimination is reflected in the overwhelming passage of the final bill by 91-6 in the Senate and 377-28 in the House of Representatives. *See* 136 Cong. Rec. 17,376 (1990) (showing Senate approval of the Conference Committee Report); 136 Cong. Rec. 17,296-97 (1990) (showing House approval of the Conference Committee Report). *See also* Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 Temp. L. Rev. 387, 387-391 (1991).

The hard-fought gains recently achieved by the passage and enforcement of the ADA, and the promise of greater equality and opportunity in the years to come, are threatened by the states' ongoing and broad-based challenges to the constitutional validity of the Act. While this case questions Congress's authority to enact the ADA under Section 5 of the Fourteenth Amendment, other state-sponsored appeals challenge the Commerce Clause and the Spending Clause as authority for federal disability rights legislation. If the Court does not take this opportunity to uphold Title II of the ADA under Section 5, federal disability laws that are just beginning to enable disabled persons to participate in critical facets of American life will be undermined before the goal of full integration has been achieved.

ARGUMENT

As this Court has recently reiterated, "Section 5 of the Fourteenth Amendment grants Congress the power to enforce the substantive guarantees contained in § 1 by enacting 'appropriate legislation.'" *Board of Trs. v. Garrett*, 531 U.S. 356, 365 (2001). This power "includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000); *see also City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). Where legislation reaches beyond the scope of Section 1's actual guarantees, this Court has held that it must exhibit "congruence and proportionality between the injury to be prevented or

remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520, cited in *Garrett*, 531 U.S. at 365.

Accordingly, in this case, the Respondents and their *amici* have demonstrated a long history and pattern of unconstitutional conduct in the administration of those very activities regulated by Title II – the "services, programs, [and] activities" of the state. As set forth in the briefs submitted, state conduct excluded and, too often, continues to exclude, disabled persons from the judicial system, public education, public transportation, voting, and other basic government services. Congress took care to document the shameful legacy of state-sponsored discrimination in the voluminous legislative history of the ADA, and to craft the congruent and proportional response found in Title II of the Act.

I. TITLE II OF THE ADA IS BEGINNING TO ALLOW PERSONS WITH DISABILITIES TO PARTICIPATE IN PUBLIC LIFE.

"Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996) (Kennedy, J.). Title II is critical to people with disabilities attempting to exercise such fundamental rights of citizenship as access to the courts, service with their peers on juries, the right to vote, the ability to enter and communicate in the halls

of city council, and the ability to receive state services in the community, free of institutional segregation.[3]

After the ADA's enactment, the National Council on Disability (NCD) found that "[v]illages, cities, counties, and States are looking at people with disabilities as real citizens. . . . Local and state government programs and facilities have become much more accessible."[4] The ADA's mandate that persons with disabilities have equal access to the basic institutions of state and local governments has resulted in substantially improved integration and inclusion over the past decade.[5]

[3] Although the bar of the Eleventh Amendment does not apply to local government agencies, there is no bright line test to determine whether a public entity will be considered an "arm of the state" for immunity purposes. Rather, courts must undertake a fact-specific, multi-factor inquiry based in large part on state law, funding, and structure. For example, county courts may or may not be immune under the Eleventh Amendment. *Compare Chisolm v. McManimon*, 275 F.3d 315, 323 (3d Cir. 2001) (county court is not an arm of the state) *with Popovich v. Cuyahoga County Ct. Com. Pl.*, 276 F.3d 808, 811 (6th Cir.) (court assumes state immunity would apply), *cert. denied*, 123 S. Ct. 72 (2002). *See also Callahan v. City of Philadelphia*, 207 F.3d 668, 670-74 (3d Cir. 2000) (municipal courts are arms of the state); *Kelly v. Municipal Courts*, 97 F.3d 902, 907-08 (7th Cir. 1996) (municipal court is arm of the state). Likewise, transit authorities have and have not been considered arms of the state for Eleventh Amendment purposes. *Compare Morris v. Washington Metro. Area Transit Auth.*, 781 F.2d 218, 224-25 (D.C. Cir. 1986) (transit authority entitled to Eleventh Amendment immunity) *with Feary v. Reg'l Transit Auth.*, 685 F. Supp. 137, 139-142 (E.D. La. 1988) (transit authority not arm of state).

[4] National Council on Disability, *Voices of Freedom: America Speaks Out on the ADA* [hereinafter *Voices of Freedom*] (1995), *at* Abstract, *at* http://www.ncd.gov/newsroom/publications/pdf/voices.pdf.

[5] *See, e.g.*, U.S. Dep't of Justice Disability Rights Section, [DOJ], *Enforcing the ADA: Looking Back on a Decade of Progress* [hereinafter

(Continued on following page)

While the ADA has been an invaluable stimulus for state self-examination and voluntary compliance, individuals with disabilities must have the right to file complaints and bring lawsuits seeking injunctive relief and damages. In many cases, damages are the only means to remedy the very real injuries caused by the state's unlawful and willful neglect. Without the right to seek damages where necessary, people with disabilities – already subject to higher rates of unemployment, poverty and social stigma – would have little incentive to bear the financial and personal burdens of initiating change.

A. Accessibility of Courts and Other Government Buildings

Equal participation in the justice system, whether as a party, witness, juror or advocate, is integral to the American way of life. This simple truth notwithstanding, the justice system itself can present tremendous barriers to the American way of life for people with disabilities. The facts of this case demonstrate the many ways that denial of courthouse access can gravely undermine the fundamental principle of open and impartial government embraced in *Romer*, 517 U.S. at 633.[6]

Enforcing the ADA] 4-8 (2000), *at* http://www.ada.gov/pubs/10thrpt.pdf; *Voices of Freedom*, *supra* note 4.

[6] Indeed, the State of Tennessee acknowledged years ago that "[f]or persons with significant physical or mental impairment, the system can be quite literally inaccessible." Comm'n on the Future of the Tennessee Judicial System, *Final Report* 31 (1996), *at* http://www.tsc.state.tn.us/geninfo/publications/futures.pdf.

George Lane, the Respondent in this case, could not appear at his own trial without having to crawl up two flights of steps, and was arrested when he refused to crawl further or be carried. Eventually the problem was "solved" by having Mr. Lane's lawyer run back and forth between his client and the second floor courtroom, denying Mr. Lane the ability to be present at proceedings critical to his case. Similarly, Plaintiff Ramsey, who is unable to climb stairs, had judgment entered against him for a failure to appear, despite the fact that he was in the courthouse. *See* Pet. App. 9, 15-16.

The Petitioner could have simply relocated Mr. Lane's and Mr. Ramsey's trials to a first floor, accessible courtroom. Instead, the Petitioner chose to exclude these citizens entirely from their day in court, denying them any remnant of due process. Moreover, exclusion from courthouses affect more than those persons directly involved in judicial matters since courthouses also function as centers of government and places of public meeting. Plaintiff Cantrel, who has paraplegia, could not attend a County Commission meeting without suffering the indignity and danger of crawling up the courthouse steps. *See* Pet. App. 3. The Plaintiffs' experiences are not unique. People with disabilities experience exclusion in a myriad of ways,[7] from jury selection procedures that eliminate people with a

[7] *See generally* American Bar Association & National Judicial College, *Court-Related Needs of the Elderly and Persons with Disabilities, Recommendations of the February 1991 Conference* (1991); Jeanne Dooley & Erica Wood, *Opening the Courthouse Door: The Americans with Disabilities Act's Impact on the Courts*, 76 Judicature 39 (1992); Keri K. Gould, *And Equal Participation for All . . . The Americans with Disabilities Act in the Courtroom*, 8 J.L. & Health 123 (1993/1994).

variety of disabilities to the lack of sign interpreters for parties and witnesses who are deaf.[8]

In many instances, the modifications needed by many disabled persons seeking access to the halls of the judiciary and other government buildings are modest.[9] Nonetheless, people with disabilities often are refused access not because they need complicated or expensive accommodations, but because they encounter exclusionary policies and attitudes that have never been critically examined. The ADA requires that critical self-examination take place.[10]

The ADA's initiation of self-examination is an important part of its effectiveness in starting necessary systemic change in state courthouses. For example, in 1995, the California Judicial Council's Subcommittee on Access for People with Disabilities began "implementing the Act [ADA] in California's courts by sponsoring comprehensive research projects and adopting a series of recommendations to increase court accessibility to persons with disabilities."[11] This research revealed that significant

[8] *See, e.g., Popovich*, 276 F.3d at 811; *Armstrong v. Davis*, 275 F.3d 849, 857 & n.11 (9th Cir. 2001), *cert. denied*, 123 S. Ct. 72 (2002); *Galloway v. Superior Court*, 816 F. Supp. 12, 15 (D.D.C. 1993) (striking down categorical exclusion of blind persons from jury service).

[9] *See, e.g., People v. Caldwell*, 603 N.Y.S.2d 713, 714 (N.Y. Crim. Ct. 1993) (juror required seat moved closer to witness box, enlarged print versions of tape transcripts used at trial, and reading documents into the record).

[10] *See* 28 C.F.R. § 35.105(a) (1993).

[11] Maryann Jones, *And Access For All: Accommodating Individuals with Disabilities in the California Courts*, 32 U.S.F. L. Rev. 75, 75 (1997); *see also* Access for Persons with Disabilities Subcommittee, Judicial

(Continued on following page)

problems persisted: "A majority of the respondents (52 percent) said that they had not received requested accommodations, and nearly half (42 percent) concluded that courts do not meet ADA standards."[12] Based on this review, the Judicial Council took numerous affirmative steps, including statewide training of courthouse ADA coordinators, the development of a nationally circulated video on disability obstacles in the courts, and the adoption of Rule of Court 989.3, which is meant to "assure that qualified individuals with disabilities have equal and full access to the judicial system."[13] Numerous courts have undertaken similar efforts, including user surveys, barrier removal, and the institution of complaint procedures.[14]

Council of California, *Summary of Survey and Public Hearing Reports of the Access for Persons with Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee* 1 (1997), *at* http://www.courtinfo.ca.gov/reference/documents/summarydisabilities.pdf.

[12] American Bar Ass'n Commission on Mental and Physical Disability Law, *Disability Law and Policy: A Collective Vision* 50 (1999). Other state surveys have also found widespread non-compliance with the ADA. *See, e.g.*, Phyllis S. Launius, *Removing Public Access Barriers to the Courts in the New Millennium: A Sampling and Analysis of Missouri's Trial Courts* 3-4 (2000) (study for the Missouri Office of State Courts Administrator observing that "only 26 percent of this sample's accessed areas are compliant with ADA standards"); Governor's Comm. on Disability Issues and Employment Civil and Legal Rights Subcomm., *Interim Court and Courthouse Access Project* 1 (2000) (noting "serious access problems in the courts and courthouses in Washington").

[13] *See* Judicial Council of California, *Fact Sheet: Access and Fairness* (June 2003), *at* http://www.courtinfo.ca.gov/reference/documents/accfair.pdf; Judicial Council of California, *Programs: Access and Fairness* (2003), *at* http://www.courtinfo.ca.gov/programs/access/activities.htm; Cal. R. Ct. 989.3(a).

[14] *See, e.g.*, Ernest J. Comer, *Implementation of the Americans with Disabilities Act in the New Jersey Judicial System* (National Center for State

(Continued on following page)

Furthermore, federal Department of Justice ADA enforcement efforts have achieved increased access in hundreds of key governmental buildings, from courthouses to city halls to state capitol buildings, throughout the 50 states.[15] However, as with other civil rights laws, private suits are a key enforcement tool.[16] In cases of injurious

---

Courts 2002) (discussing New Jersey judiciary's accessibility plan, begun in 1993), *at* http://www.ncsconline.org/WC/Publications/CS_AmeDisActNJPub.pdf; Mark Van Bever, *Implementing the Americans with Disabilities Act in a Trial Court* (National Center for State Courts 2002) (discussing ADA compliance efforts of Florida's Eighteenth Judicial Circuit), *at* http://www.ncsconline.org/WC/Publications/CS_AmeDisActImpNJPub.pdf. The courts self-assessment process has often resulted in voluntary compliance. *See Voices of Freedom*, *supra* note 4 (describing access improvements to basic government facilities and public meetings in the five years after the ADA's enactment in dozens of locations throughout all 50 states).

[15] There has been extensive administrative and court activity in this area. The Justice Department has investigated and settled complaints in almost every state in the nation. *See, e.g.*, DOJ, *Final Settlement Agreement between the U.S. and Metropolitan Government of Nashville and Davidson County, Tennessee* (2003), *at* http://www.ada.gov/nashvil2.htm (physical barrier removal); DOJ, *Settlement Agreement between the U.S. and Hancock County, Mississippi* (2003), *at* http://www.ada.gov/hancocks.htm (provision of effective communication services for jurors who are deaf or hard of hearing); DOJ, *Settlement Agreement Between the U.S. and the Santa Clara County Superior Court* (2003), *at* http://www.usdoj.gov/crt/ada/santacl.htm (provision of auxiliary aids and services for persons with hearing impairments). *See also* DOJ, *10th Anniversary of the ADA Press Page* (2000), *at* http://www.ada.gov/archive/10anpage.htm (providing links to regional reports describing at least 50 examples of cities and states improving city halls and other basic government buildings and programs); DOJ, *Project Civic Access* (2003), *at* http://www.ada.gov/civicac.htm (providing links to 56 settlement agreements with cities, counties, and states).

[16] *See, e.g.*, *Layton v. Elder*, 143 F.3d 469, 472 (8th Cir. 1999) (remanding for entry of injunction against inaccessible courthouse); *Matthews v. Jefferson*, 29 F. Supp. 2d 525, 233-34 (W.D. Ark. 1998) (ordering summary judgment to plaintiffs after Court scheduled three

(Continued on following page)

conduct, often the only effective remedy is money damages. *See, e.g., Barnes v. Gorman*, 122 S. Ct. 2097, 2099-2100 (2002) (describing injuries experienced by paraplegic plaintiff transported in a hazardous manner by police, including shoulder and back injuries, bladder infection, and spasms leaving him unable to work full-time). As this Court recognized in *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388, 410 (1971), sometimes "it is damages or nothing."

B. Voting Accessibility

The ability to vote is something most Americans take for granted and associate with membership in a democratic society. The fact that this basic right is still inaccessible to many individuals with disabilities demonstrates the extreme degree to which the needs of disabled citizens have been ignored by state election officials.[17] During the 1998 Congressional elections, approximately 20,000 polling places were inaccessible to wheelchair users.[18] Of

hearings in inaccessible courtroom for paraplegic who had to be carried and had no access to bathroom).

[17] In addition to the barriers to voting access identified above, at least forty-two states totally disenfranchise citizens with mental disabilities in a variety of contexts. *See* Kay Schriner et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 Berkeley J. Emp. & Lab. L. 437, 456 tbl. 2 (2000); *see also Doe v. Rowe*, 156 F. Supp. 2d 35, 38 & n.2 (D. Me. 2001) (noting disenfranchisement of persons with disabilities in Maine and other states).

[18] National Council on Disability, *Inclusive Federal Election Reform* (2001), *at* http://www.ncd.gov/newsroom/publications/pdf/electionreform.pdf; Coalition for Accessible Political Elections (CAPE), *Report of the*

(Continued on following page)

those voters with disabilities who could reach the polling area, fifty-two percent found that the area lacked a designated, appropriately sized voting booth for them to cast their vote.[19] Seventy-three percent of the polling places in the major urban center of Philadelphia were physically inaccessible to voters with disabilities.[20] Eighty-one percent of voters who are blind or visually impaired had to rely on others to mark their ballots for them.[21] Perhaps most disturbing, more than ten years after the ADA was enacted, accessibility is often not even considered a factor in choosing polling sites.[22]

As with other areas where exclusion and segregation of people with disabilities has resulted in inaccessible public services, Title II provides an important vehicle to promote access and awareness.[23] Cases brought under the

National Voter Independence Project [hereinafter NVIP Report], *at* http://www.nhdde.com/publications/PollingFinalReport.pdf.

[19] NVIP Report, *supra* note 18.

[20] *Inclusive Federal Election Reform*, *supra* note 18.

[21] *Id.*

[22] Center for an Accessible Society, *8 out of 10 Polling Sites have Access Barriers, Says GAO Report* (2001), *at* http://www.accessiblesociety.org/topics/voting/gaovoterept1101.htm.

[23] Voting was plainly one of the concerns addressed in the Senate Report accompanying the Act and debated on the floor. *See* S. Rep. No. 101-116, at 12 (1989) (quoting Illinois Attorney General, who stated that "[y]ou cannot exercise one of your most basic rights as an American if the polling places are not accessible."). *See also* 135 Cong. Rec. S10753 (daily ed. Sept. 7, 1989) (remarks of Senator Gore: "As a practical matter, many Americans with disabilities find it impossible to vote. Obviously, such a situation is completely unacceptable and unconscionable. We must take strong action to end the tradition of blatant and subtle discrimination that has made people with disability second-class citizens.").

ADA are challenging inaccessible polling places, and are resulting in greater awareness by state and local voting officials. For example, the disability community in Texas filed lawsuits that resulted in cooperative efforts with election officials. Counsel for plaintiffs, James Harrington, writes that "[t]o their credit, each County showed great willingness to participate in significant negotiations. Local officials were keen on making their voting systems usable by people who are blind. This spirit of negotiation produced great creativity."[24] And, eventually, awareness of the needs of voters with disabilities became a statewide concern. As reported by Harrington, "successive Secretaries of State ... now facilitate and actively encourage access to the secret ballot for people with disabilities."[25]

These types of lawsuits have shown that solutions are possible, and have been used by other groups to bring suits under the ADA.[26] Because of the ADA, there have also been innovations in technology which foresee a future where

[24] James C. Harrington, *Pencils Within Reach and A Walkman or Two: Making the Secret Ballot Available to Voters Who are Blind or Have Other Physical Disabilities*, 4 Tex. F. on C.L. & C.R. 87, 95 (1999).

[25] *Id.* at 105.

[26] For example, a coalition of groups including the Eastern Paralyzed Veterans Association and the Blinded Veterans of America began class-action lawsuits against Washington, D.C., and Philadelphia, Pennsylvania, using examples like Harris County, Texas, the nation's third largest county, which had already put accessible voting systems in place. American Association of People with Disabilities, *New GAO Report Shows Disabled are Denied Voting Access* (2001), *at* http://www.aapd.com/docs/Gao101601.html.

the gross inequality in voting access will be a thing of the past.[27]

C. Community Integration

Perhaps the most basic, yet profound impact of the ADA is the gradual reversal of a shameful history of unnecessary segregation of people with disabilities in large, state-operated institutions.[28] This Court's decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), has spawned a national examination of the extreme harm caused by institutionalization. As this Court stated in *Olmstead*, 527 U.S. at 601, "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." Accordingly, the court

[27] Although the Federal Election Commission estimates that 20,000 of the country's 27,000 polling sites do not meet ADA requirements, new technology is being developed and tested to achieve compliance. For example, emerging technology allows a visually impaired voter to have the ballot read to him or her, and a hearing impaired voter to utilize a hearing aid compatible headset. John M. Williams, *Making Access to the Ballot Box a Snap for Disabled Voters*, Bus. Week Online, Sept. 15, 1999, *at* http://www.businessweek.com/bwdaily/dnflash/sep1999/nf90915c.htm.

[28] The connection between segregation and discrimination was highlighted by Congress in three of the findings statements in the ADA. *See* 42 U.S.C. § 12101(a)(2) ("[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination ... continue to be a serious and pervasive social problem"); *id.* at § 12101(a)(3) ("[D]iscrimination against individuals with disabilities persist in such critical areas as ... institutionalization."); *id.* at § 12101(a)(5) ("[I]ndividuals with disabilities continually encounter various forms of discrimination, including ... segregation.").

found that under Title II of the ADA, states are required to provide community-based services when it is professionally advisable to do so and when the disabled individual so chooses. *Id.* at 607.

In response to *Olmstead*, federal officials with the Department of Health and Human Services issued a set of recommendations to state Medicaid directors, outlining principles for states to consider when developing their *Olmstead* plans.[29] The need for such planning is critical to the thousands of people nationwide who have been recommended for community placement but who remain waiting in institutions indefinitely.[30] A recent NCD report found that a majority of states still fail to plan for identifying and providing community placement for institutionalized persons who meet the *Olmstead* criteria, and that few plans contain timelines and targets for community placement or provide consistent opportunities for life in the most integrated setting.[31]

[29] Letter from Timothy M. Westmoreland, Director, Center for Medicaid and State Operations, Health Care Financing Administration, & Thomas Perez, Director, Office of Civil Rights, U.S. Dep't of Health and Human Services, to State Medicaid Directors (January 14, 2000), *at* http://www.cms.hhs.gov/states/letters/smd1140a.asp.

[30] *See* Sharon Davis, et al., The Arc, *A Status Report to the Nation on People with Mental Retardation Waiting for Community Services* (1997), *at* http://www.thearc.org/misc/WaitPage.html (noting over 5000 persons waiting in state institutions for community placement in 16 states reporting such data).

[31] *See* National Council on Disability, *Olmstead: Reclaiming Institutionalized Lives* (Full-Length On-Line Version) [hereinafter Reclaiming Institutionalized Lives] (August 19, 2003), *at* http://www.ncd.gov/newsroom/publications/reclaimlives.html.

Notably, Tennessee continues the historic practice of segregating persons with disabilities in state institutions.[32] A 2002 report found "that Tennessee ranked 45th in the provision of home and community based waiver services," and that the vast majority of the state's long-term care dollars went to institutional settings rather than home health care and other services that permit people with disabilities to live in the community.[33] According to NCD, the ability of the Tennessee disability coalition "to develop an *Olmstead* plan was severely curtailed by the refusal of the relevant state agencies to cooperate in the planning process in any meaningful fashion."[34]

While change is slow, states are beginning to explore community-based options. As of December 2001, forty states, along with the District of Columbia, had commissions or task forces working to improve their state's management of long-term care,[35] and fourteen states had developed *Olmstead* plans as of May 2002.[36] State agencies are increasingly recognizing the basic principles of integration and community-based care, and are taking steps to

[32] Duren Cheek, *Lawmaker Pleads for Home-care Funds for Elderly*, Tennessean.com, May 19, 2000, *at* http://www.tennessean.com/sii/00/05/19/gacare19.shtml (noting State Representative John Arriola's comments that "Tennessee has sunk to dead last in the nation in providing alternatives to nursing home care").

[33] Reclaiming Institutionalized Lives, *supra* note 31, at ch. V.

[34] *Id.*

[35] Wendy Fox-Grage et al., National Conference of State Legislators, *The States' Response to the* Olmstead *Decision: How Are States Complying?* (2003), *at* http://www.ncsl.org/programs/health/forum/olmsreport.htm.

[36] Alexandra Stewart et al., Center for Health Care Strategies, Inc., *Implementing Community Integration: A review of State* Olmstead *Plans* 4 (2002), *at* http://www.chcs.org/publications/pdf/cas/stateOlmsteadplans.pdf.

follow the Federal mandate to design, deliver and finance community services.[37] *"Olmstead"* lawsuits are bringing pressure to bear, and have resulted in the increased availability of community options.[38]

There can be no doubt that the state initiatives in this area are a direct result of the ADA and this Court's *Olmstead* decision.[39] Vigorous enforcement by the federal

[37] *See Reclaiming Institutionalized Lives*, *supra* note 31. For example, Maine has instituted screening by an independent agency before admission to nursing facilities as a means of overcoming a systemic emphasis on institutionalization, while advocates in Colorado and Kansas work to identify individuals in nursing facilities who could move to more integrated settings. Vermont and New Hampshire are beginning to close group homes in favor of individual or companion homes in an effort to provide "the most integrated setting." Under the influence of the Department of Health and Human Services' Office of Civil Rights, the most recent *Olmstead* plans are beginning to incorporate critical input from housing agencies.

[38] *See, e.g.*, *Barthelemy v. Louisiana Dept. of Health & Hosp.*, No. Civ.A. 00-1083, 2003 WL 1733534 (E.D. La. Mar. 31, 2003); *Rolland v. Cellucci*, 198 F. Supp. 2d 25 (D. Mass. 2002); *see also* Gary A. Smith, National Ass'n of State Directors of Developmental Disabilities Servs., Inc., *Status Report: Litigation Concerning Medical Services for Persons with Developmental Disabilities* 15-19 (2001), *at* http://www.qualitymall.org/download/litigation.pdf (collecting cases).

[39] For example, as the Ohio *Olmstead* plan states, "[s]tate policy makers *must continue to be responsive to the Health Care Financing Administration and the federal Office of Civil Rights to assure Ohio's compliance with the mandates of the Americans with Disabilities Act.*" (emphasis added) Thomas W. Johnson et al., Office of Budget and Management, *Ohio Access for People with Disabilities: Final Report to Governor Taft* 3 (2001), *at* http://www.state.oh.us/age/ohioaccessrpt.pdf (emphasis added). The Introduction to the Missouri plan states that its Home and Community-Based Services and Consumer-Directed Care Commission was established *"[t]o address the implications of the Olmstead decision,"* and that *"[t]he objective of the Commission was to develop a 'comprehensive, effectively, working plan' as recommended by the*

(Continued on following page)

government and private litigants remains essential to ensure compliance with *Olmstead*.

D. Public Transportation

Similar to the observation in *Olmstead* that "confinement in an institution severely diminishes the everyday life activities of individuals," 527 U.S. at 601, so too does the lack of accessible public transportation "severely diminish" other important life activities. As noted by Senator Dole, "Transportation is the critical link to employment. This bill will result in accessible public transportation to and from the work site. Living independently and with dignity means opportunity to participate fully in every activity of daily life, be it going to the movies, dining in a restaurant, cheering at a baseball game, communicating by phone or going to the doctor." 136 Cong. Rec. 17,376 (daily ed. July 13, 1990).

People with disabilities have historically been denied access to public life by the failure to make public transportation accessible. The accessibility of buildings as well as employment and education opportunities are meaningless when people with disabilities have no way to reliably and inexpensively reach their destinations. It is not possible to overstate the differences that Title II has made for people with disabilities who need to use public

U.S. Supreme Court Olmstead decision." Home and Community-Based Servs. and Consumer-Directed Care Comm'n, *Working Plan*, *at* http://www.dolir.state.mo.us/gcd/olmstead/olmreport/coverpage.htm (emphasis added). It should be stressed that without Section 5 authority for Title II, this crucial area of progress could be left without other valid constitutional grounding. *See infra* section III.

transportation. The comprehensiveness of the ADA mandate – cutting across all modes of transportation (from fixed-route buses to light rail transit to cross-country trains) – is critical to the law's success in actually changing how public transportation is provided across the nation.[40]

Prior to the ADA's enactment, "the provision of accessible transportation in the United States was always varied and uneven. Uniform accessible transportation did not exist until it was required by the passage of the Americans with Disabilities Act of 1990."[41]

The ADA's directive to public transit authorities, that vehicles leased or purchased after specified dates be "readily accessible to and usable by individuals with

---

[40] The ADA's comprehensive transportation mandate was thoroughly studied and reviewed during the ADA's development and enactment. *See* Americans with Disabilities Act: Hearings before the Subcommittee on Surface Transportation of the Committee on Public Works and Transportation on H.R. 2273, 101st Cong. 56 (1989) (Testimony of Larry Roffee, Executive Director of the Architectural and Transportation Barriers Compliance Board: "Through conducting public forums around the country and sponsoring research projects and studies, the Access Board has gathered extensive information about the extent and effects of discriminatory barriers experienced by persons with disabilities in public accommodations and public transportation. The Access Board has carefully analyzed the provisions of the Americans with Disabilities Act which have passed the Senate and believes that they provide a comprehensive solution to removing these barriers.").

[41] Rosalyn M. Simon, *Status of Transportation Accessibility in the United States: Impact of the Americans with Disabilities Act* [hereinafter Status of Transportation Accessibility], *in* Proceedings of Seminar Held at the Planning and Transportation Research and Computation European Transport Forum § 1.2 (1996).

disabilities,"[42] initiated significant measurable changes in national transportation accessibility. As Rosalyn M. Simon notes:

> In 1989, one-third (36%) of the national bus fleet was accessible. Post-ADA fixed route bus accessibility increased to 39 percent in 1990, 46 percent in 1991, and 52 percent in 1992. . . . [T]he federal government reported the national bus fleet as 55 percent accessible . . . in 1994 and 60 percent accessible . . . in 1995. Their projections indicate that by 2002, the national bus fleet will be 100 percent lift/ramp-equipped. In addition, by 2005, all fixed route buses will also be equipped with ADA-compliant communication systems . . . More than 100 public transit systems are now providing 100 percent accessible fixed route bus service during peak hours.[43]

These dramatic improvements in accessibility are directly attributable to Congress's establishment of broad national standards for public transportation accessibility, standards which were crafted following years of negotiation with transit authorities. Without the ADA, the interstate mobility of people with disabilities would always be subject to substantive and technical differences in state accessibility requirements. At the same time, the provisions are reasonable and gradual. Based on the turnover of vehicles, a natural consequence of normal wear and tear and technical obsolescence, the ADA's transportation rules comprise a flexible and proportionate approach.

---

[42] 42 U.S.C. § 12142(a)-(c) (collectively encompassing new, used and remanufactured vehicles).

[43] Status of Transportation Accessibility, *supra* note 41, at § 3.1.

II. THE SCOPE OF REMEDIAL RELIEF AVAILABLE FURTHER CONFIRMS THE PROPORTIONALITY OF CONGRESS'S REMEDIES.

Congress took appropriate and reasonable steps to ensure that people with disabilities have access to government programs. Congress did not order immediate physical access, crafting instead a gradual and reasonable program of self-evaluation and transition.[44] In fact, the physical accessibility requirements only apply to construction after the date of the ADA's enactment, or when "program accessibility" cannot be achieved in another way.[45] Under the flexible "program accessibility" standard, physical alterations are only one of several options that can be taken depending on the circumstances.

[44] Courts subject to the ADA were required to perform, within one year of the law's effective date, a self-assessment of all current services, policies and practices, and their effects. 28 C.F.R. § 35.105(a) (1993). According to a 1994 study conducted by David Pfeiffer and Joan Finn, based on questionnaires sent to local governments around the country as well as state and territorial governments, 85 percent of state and territorial government had conducted accessibility surveys of their courthouses, and 93 percent of municipal courthouses had conducted accessibility surveys. Pfeiffer and Finn posit that "it is not possible to say that these finding are due solely to the ADA, but certainly the ADA would appear to be a significant factor." David Pfeiffer & Joan Finn, *Survey Shows State, Territorial, Local Public Officials Implementing ADA*, 19 Mental & Physical Disability L. Rep. 537, 537-540 (1995).

[45] *See* 42 U.S.C. §§ 12131-12134; 28 C.F.R. § 35.130. Only buildings constructed after the ADA's effective date are required to meet specific accessibility requirements. *See* 28 C.F.R. § 35.151(a); 28 C.F.R. § 35.150(a), (b)(1).

In addition, for purposes of Title II, many courts have limited money damages to the most egregious cases.[46] This Court could similarly limit the money damages available in Title II cases if necessary to comport with this Court's prior Section 5 holdings. This result would be far preferable to the more draconian one of finding that Title II is not authorized by Section 5. Such an approach is consistent with established Court doctrine. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 465-66 (1989) (courts should avoid interpretations that would render a statute unconstitutional).

[46] *See, e.g., Delano-Pyle v. Victoria County, Tex.*, 302 F.3d 567, 575 (5th Cir. 2002) ("[I]n order to receive compensatory damages for violations of [the ADA or the Rehabilitation Act], a plaintiff must show intentional discrimination."); *Garcia v. S.U.N.Y. Health Sci. Ctr. of Brooklyn*, 280 F.3d 98, 112 (2d Cir. 2001) ("[W]e hold that a private suit for money damages under Title II of the ADA may only be maintained against a state if the plaintiff can establish that the Title II violation was motivated by either discriminatory animus or ill will due to disability."); *Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998) ("[C]ompensatory damages are not available under Title II or § 504 absent a showing of discriminatory intent."); *see also Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999) ("[E]ntitlement to compensatory damages under section 504 of the Rehabilitation Act requires proof that the defendant has intentionally discriminated against the plaintiff."); *Wood v. President and Trs. of Spring Hill Coll.*, 978 F.2d 1214, 1219-20 (11th Cir. 1992) ("[G]ood faith attempts to pursue legitimate ends are not sufficient to support an award of compensatory damages under section 504. . . . [C]ontrolling precedent on . . . section 504 actions under the Rehabilitation Act, indicates that compensatory damages are precluded in cases of unintentional discrimination, but are permissible on a showing of intentional discrimination."); *Panzardi-Santiago v. University of Puerto Rico*, 200 F. Supp. 2d 1, 20-21 (D. P.R. 2002) (requiring showing of intentional discrimination for damages under Rehabilitation Act).

As the Second Circuit has noted, "[g]overnment actions based on discriminatory animus or ill will towards the disabled are generally the same actions that are proscribed by the Fourteenth Amendment – *i.e.* conduct that is based on irrational prejudice or wholly lacking a legitimate government interest." *Garcia v. S.U.N.Y Health Sci. Ctr. of Brooklyn*, 280 F.3d 98, 111 (2d Cir. 2001). Given the "broader swath" of conduct that can be proscribed under Section 5 of the Fourteenth Amendment, a damage remedy certainly falls within constitutional bounds wherever intentional discrimination is found, regardless of whether the discrimination is akin to "deliberate indifference" or "discriminatory animus." *Cf. Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 290 (1989) (adopting "deliberate indifference" as standard for damages for discrimination prohibited by Title IX, which like Section 504 and Title II of the ADA adopts Title IV remedies, *see* 42 U.S.S. § 12133); *Ferguson v. City of Phoenix*, 157 F.3d 668, 675 (9th Cir. 1998). Permitting damages for violations evidencing deliberate indifference functions to remedy and deter state actions that are unconstitutional under the Fourteenth Amendment, and thus comports fully with this Court's prior Section 5 jurisprudence.

III. THE CONTRIBUTIONS OF THE ADA ARE THREATENED BY SOME STATES' ONGOING AND BROAD-BASED CONSTITUTIONAL CHALLENGES TO ITS VALIDITY.

The question now before this Court is whether Congress had the authority under Section 5 of the Fourteenth Amendment to enact Title II of the Americans with Disabilities Act, which permits individuals to seek money damages from the state to remedy disability discrimination.

While this case is limited to one relatively circumscribed, albeit critical, aspect of federal disability discrimination law – the availability of private suits for damages against states under Title II – this challenge is but one part of an ongoing effort by some states to be free of disability non-discrimination mandates. States are contesting whether Title II is facially constitutional through challenges to Title II actions against state officials for injunctive remedies.[47] States have also challenged specific applications of Title II as being beyond the reach of the Commerce Clause.[48]

---

[47] Such challenges continue despite the recent acknowledgement by this Court of the continued viability of the *Ex Parte Young* doctrine in the context of Title I of the ADA. *Garreti*, 531 U.S. at 32 n.9 (citing *Ex Parte Young*, 209 U.S. 123 (1908)). *See, e.g.*, Defendant's Motion to Dismiss in *McCarthy v. Gilbert*, Civil Action No. 02-CV-600 (E.D. Tex.) (arguing that *Ex Parte Young* cannot be used to enforce Title II of the ADA or its regulations because Title II exceeds the scope of Congress's power under Section 5 and the Commerce Clause); Brief of Appellees in *Meyers v. Texas*, Case No. 02-50452 (5th Cir.) ("Because it offends fundamental notions of federalism to permit *Young* suits based on statutes Congress lacked authority to enact under Section 5, the Court should hold that there is no Eleventh Amendment exception permitting prospective enforcement of federal laws – like Title II – under which Congress did not abrogate Eleventh Amendment and sovereign immunity."); *see also Henrietta D. v. Bloomberg*, 331 F.3d 261, 287-89 (2d Cir. 2003) (dismissing state defendant's various arguments challenging *Ex Parte Young* relief); *Thompson v. Colorado*, 278 F.3d 1020, 1025 n.2 (10th Cir. 2001) (noting state's challenge to constitutionality of Title II under Commerce Clause after plaintiffs sought leave to amend complaint to add *Ex Parte Young* claim for injunctive relief). In their brief before this Court, Tennessee's *amici* similarly question whether Title II is a valid basis for an award of injunctive relief. *See* Brief of *Amici Curiae* Alabama et al., in Support of Petitioner 5.

[48] Several states, including Connecticut, Pennsylvania, North Carolina, Maryland, and Virginia, have argued that Congress lacked Commerce Clause authority specifically to regulate prisons under the

(Continued on following page)

States have attempted to minimize the impact of recent Section 5 rulings eliminating damages awards against states by referencing the availability of damages in cases brought under Section 504 of the Rehabilitation Act of 1973.[49] At the same time, however, states are continuing to challenge the constitutionality of such Section 504 claims. As the State of Tennessee notes in its brief, states have argued that they have not waived their sovereign immunity by accepting federal funds, an argument which has been correctly rejected by most federal appellate courts.[50] The states also continue to argue that the

ADA. *See* Brief for the Petitioners at 23-24, *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998) ("Neither the Commerce Clause nor the Fourteenth Amendment gives Congress the power to regulate the management of state prisoners."); *see also Amos v. Maryland Dep't of Public Safety & Corr. Servs.*, 178 F.3d 212, 214-15 (4th Cir. 1999), *vacated for rehearing en banc, subsequently dismissed pursuant to settlement*, 205 F.3d 687 (4th Cir. 2000); *Hicks v. Armstrong*, 116 F. Supp. 2d 287, 290 (D. Conn. 1999); *Saunders v. Horn*, 959 F. Supp. 689, 696-97 (E.D. Penn. 1997); *Pierce v. King*, 918 F. Supp. 932, 938 (E.D.N.C. 1996) (holding that Congress lacked Commerce Clause authority to regulate prisons under Title II, as prison labor does not substantially affect interstate commerce, citing *United States v. Lopez*, 514 U.S. 549 (1995)); *Staples v. Virginia Dept. of Corrs.*, 904 F. Supp. 487, 490 (E.D. Va. 1995).

[49] *See, e.g.*, Brief for Petitioners at 38, *Board of Trs. v. Garrett*, 531 U.S. 356 (2001) (No. 02-1667) (noting availability of "comparable injunctive and monetary remedies of the Rehabilitation Act"). This Court reaffirmed the availability of damages remedies under the Rehabilitation Act in *Barnes v. Gorman*, 122 S. Ct. 2097 (2002).

[50] *See* Brief of Petitioner at 36 n.9. *Cf. Garrett v. Bd. of Trs. of the Univ. of Alabama*, 344 F.3d 1288 (11th Cir. 2003); *Shepard v. Irving*, No. 02-1712, 2003 WL 21977963 (4th Cir. Aug. 20, 2003); *Koslow v. Pennsylvania Dep't of Corr.*, 302 F.3d 161 (3d Cir. 2002); *Robinson v. Kansas*, 295 F.3d 1183 (10th Cir. 2002) (Section 504 and Title VI); *Douglas v. California Dep't of Youth Auth.*, 271 F.3d 812 (9th Cir. 2002), *reh'g en banc denied*, 285 F.3d 1226 (9th Cir. 2002); *Nihiser v. Ohio*

(Continued on following page)

requirements of the Rehabilitation Act are not "reasonably related" to the purposes of the federal funds disbursed, or that conditioning the funds is somehow unconstitutionally coercive.[51]

CONCLUSION

The promise of the ADA is just beginning to be realized. States are making the basic vestiges of citizenship available to persons with disabilities for the first time in history. This progress is in keeping with the most fundamental principles of equality embodied in the Fourteenth Amendment. There can be no doubt that the invalidation of Congress's long and deliberative process in recognizing and remedying "the continuing existence of unfair and unnecessary discrimination and prejudice"[52] toward people with disabilities will impede continuing progress toward a nation where people with disabilities can participate fully in civic life.

Envt'l Prot. Agency, 269 F.3d 626 (6th Cir. 2001); *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000) (en banc), *cert. denied sub nom. Arkansas Dep't of Educ. v. Jim C.*, 121 S. Ct. 2591 (2001); *Stanley v. Litscher*, 213 F.3d 340 (7th Cir. 2000). *But see Pace v. Bogalusa City School Bd.*, 325 F.3d 609, *reh'g en banc granted*, 339 F.3d 348 (5th Cir. 2003); *Garcia*, 280 F.3d 98.

[51] *See, e.g., Lovell v. Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003); *Koslow*, 302 F.3d at 173-76; *Jim C.*, 235 F.3d at 1081-82 (rejecting state's argument that Rehabilitation Act requirements upon federal funding were unduly coercive). However, in *Jim C.*, the dissenting four judges used the tests enunciated by this Court in *South Dakota v. Dole*, 483 U.S. 203 (1987), as the basis for opining that Congress lacked authority under the Spending Clause to enact Section 504. *Jim C.*, 235 F.3d at 1082-85 (8th Cir. 2000) (en banc).

[52] 42 U.S.C. § 12101(a)(9).

When President George H.W. Bush signed the Americans with Disabilities Act he stated:

> And today, America welcomes into the mainstream of life all of our fellow citizens with disabilities. We embrace you for your abilities and for your disabilities, for our similarities and indeed for our differences, for your past courage and your future dreams. Last year, we celebrated a victory of international freedom. Even the strongest person couldn't scale the Berlin Wall to gain the elusive promise of independence that lay just beyond. And so, together we rejoiced when that barrier fell.
>
> And now I sign legislation which takes a sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America.[53]

[53] Reprinted in National Council on Disability, *Equality of Opportunity: The Making of the Americans with Disabilities Act* at App. G (1997), *at* http://www.ncd.gov/newsroom/publications/equality_2.html#g.

While progress has been great, the ADA is still an indispensable tool to put equal citizenship firmly within the grasp of Americans with disabilities.

November 12, 2003

Respectfully submitted,

*ARLENE B. MAYERSON, Esquire
SILVIA YEE, Esquire
DISABILITY RIGHTS EDUCATION AND DEFENSE FUND
*Counsel of Record

CLAUDIA CENTER, Esquire
LEWIS BOSSING, Esquire
ELIZABETH KRISTEN, Esquire
THE LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER

APPENDIX

BIOGRAPHIES OF *AMICI CURIAE*

Dick Thornburgh served as Governor of Pennsylvania, Attorney General of the United States under Presidents Reagan and Bush, and the highest-ranking American at the United Nations. As Attorney General from 1988 to 1991, Thornburgh oversaw congressional debate and passage of the Americans with Disabilities Act (ADA). He subsequently developed regulations implementing that legislation. Attorney General Thornburgh has often referred to his tireless work to bring the ADA into law as one of his proudest moments. Attorney General Thornburgh is a founding member of the National Organization on Disability (N.O.D.) and currently serves as Vice-Chairman of the World Committee on Disability. He filed a brief *amicus curiae* regarding the *Olmstead* case in the United States Supreme Court on behalf of N.O.D., asserting the validity of the integration regulations he issued as Attorney General. It is Attorney General Thornburgh's view that it is critically important that this Court's decision in *Olmstead*, which has provided the needed impetus for states to reverse historic segregation, not be undermined by a holding that Congress lacked Constitutional authority to enact Title II. In 2001 he received the George Bush Medal for his service to persons with disabilities, and in 2003 he and his wife Ginny Thornburgh received the Henry B. Betts award. Together, the Thornburghs have worked in the public eye to maximize opportunities for persons with disabilities in their communities, jobs, schools and congregations. Attorney General Thornburgh is currently counsel to Kirkpatrick & Lockhart LLP, a national law firm, in its Washington, DC office.

The mission of the **National Organization on Disability (N.O.D.)** is to expand the participation and contribution of America's 54 million men, women and children with disabilities in all aspects of life. For more than 20 years, N.O.D. has built and sustained programs that raise disability awareness, encourage physical and attitudinal accessibility, make America's communities accessible, and provide opportunities for employment and growth. N.O.D. joined with other disability organizations and advocates in the effort to enact the ADA. Through business, community, association, and advocacy partnerships, including its Community Partnership Program and its C.E.O. Council, N.O.D. strives to eliminate barriers and to improve work opportunities for Americans with disabilities. N.O.D.'s leadership includes Honorary Chairman George H.W. Bush, Chairman Michael R. Deland, Vice Chairman Christopher Reeve, and President Alan Reich, together with a Board of Directors including business leaders and prominent disability advocates.

The **American Association of People with Disabilities (AAPD)** is a national non-profit, non-partisan membership organization whose mission is to promote the political and economic power of children and adults with disabilities in the U.S. Founded on the fifth anniversary of the Americans with Disabilities Act (ADA), AAPD has a strong interest in full and effective enforcement of that landmark law. With more than 60,000 members, AAPD is the largest cross-disability membership organization in the United States.

ADA Watch is a project of the **National Coalition for Disability Rights (NCDR)**, a nonprofit alliance of hundreds of organizations united to protect and promote

the civil rights of people with physical, mental, developmental, and cognitive disabilities. ADA Watch was founded to counteract threats to the enforcement of the Americans with Disabilities Act (ADA) and other federal disability rights laws.

Supreme Court, U.S.
FILED
NOV 1 2 2003
OFFICE OF THE CLERK

No. 02-1667

In The Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

GEORGE LANE, BEVERLY JONES, AND UNITED STATES OF AMERICA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE STATES OF MINNESOTA, CONNECTICUT, ILLINOIS, MASSACHUSETTS, MISSOURI, NEW MEXICO, NEW YORK, VERMONT, WASHINGTON AND WISCONSIN *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

MIKE HATCH
Attorney General
State of Minnesota
Counsel of Record

GARY R. CUNNINGHAM
KRISTYN ANDERSON
Assistant Attorneys General

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 282-5700

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

35 pp

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

LISA MADIGAN
Attorney General
State of Illinois

THOMAS F. REILLY
Attorney General
State of Massachusetts

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

PATRICIA A. MADRID
Attorney General
State of New Mexico

ELIOT SPITZER
Attorney General
State of New York

WILLIAM H. SORRELL
Attorney General
State of Vermont

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

PEGGY A. LAUTENSCHLAGER
Attorney General
State of Wisconsin

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE* STATES	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. This Court's Decision In *Board Of Trustees Of The University Of Alabama v. Garrett* Is Not Determinative Of The Issue Presently Before The Court	3
II. Congress Validly Abrogated The States' Sovereign Immunity When It Enacted Title II Of The ADA	4
A. Congress Identified Substantial Evidence Of Irrational State Conduct Supporting Its Finding Of A History And Pattern Of State Discrimination Against People With Disabilities In The Provision Of Public Services, Programs And Activities	5
B. In Adopting Title II, Congress Identified State Discrimination That Violated The Fundamental Constitutional Rights Of People With Disabilities	8
C. Congress Made Explicit Findings Of State Discrimination Against People With Disabilities In The Provision Of Public Services, Programs And Activities	11
D. Shortcomings In Existing Law Justified The Enactment Of Title II	13

TABLE OF CONTENTS – Continued

Page

III. Given The Substantial Evidence Of State-Sponsored Discrimination Against People With Disabilities, Title II Is A Measured And Balanced Response To Remedy And Deter State-Perpetuated Disability Discrimination.... 16

A. Title II Reasonably Proscribes Unconstitutional State Conduct 19

B. Title II's Reasonable Modification Provision Is Consistent With States' Responsibilities Under The Constitution 21

C. Congress Imposed Important Limitations In Title II Which Produce A Congruent And Proportional Remedy 24

CONCLUSION..... 26

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alexander v. Choate, 469 U.S. 287 (1985) 2

Amadon v. Immigration & Naturalization Serv., 226 F.3d 724 (6th Cir. 2000).....21, 23

Board of Educ. v. Mergens, 496 U.S. 226 (1990) 13

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001).....*passim*

Boddie v. Connecticut, 401 U.S. 371 (1971).....9, 20

Bounds v. Smith, 430 U.S. 817 (1977).....20, 22

City of Boerne v. Flores, 521 U.S. 507 (1997) 5, 16, 17, 24

City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).....2, 5, 6, 22

Dunn v. Blumstein, 405 U.S. 330 (1972) 9, 20

Estelle v. Gamble, 429 U.S. 1066 (1976).....20

Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn, 280 F.3d 98 (2d Cir. 2001) 19

Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966)..... 9

Katzenbach v. Morgan, 384 U.S. 641 (1966).....23

Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).....4, 16, 17

Nevada Human Resources v. Hibbs, __ U.S. __, 123 S. Ct. 1972 (2003).....*passim*

Olmstead v. Zimring, 527 U.S. 581 (1999) 12, 19, 25

Plyler v. Doe, 457 U.S. 202 (1982).....18, 22

TABLE OF AUTHORITIES – Continued

Page

Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 72 (2002) 23

Radice v. New York, 264 U.S. 292 (1924) 13

School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) 2

Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) 4

Sutton v. United Airlines, Inc., 527 U.S. 471 (1999) 25

Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) 25

Youngberg v. Romeo, 457 U.S. 307 (1982) 20

CONSTITUTIONAL PROVISIONS AND STATUTES

20 U.S.C. §§ 1400-1491 ..... 17, 18

29 U.S.C. § 794a 25

42 U.S.C. § 2000e-5(g) 25

42 U.S.C. § 12101(a)(3), (5) 12

42 U.S.C. § 12102(2) 25

42 U.S.C. § 12131, *et seq.* 1

42 U.S.C. § 12131(2) 21, 24

42 U.S.C. § 12133 25

42 U.S.C. § 12202 5

FEDERAL RULES AND REGULATIONS

28 C.F.R. § 35.130(b)(7) 22, 24

28 C.F.R. § 35.150(b)(1) 25

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Accommodating the Spectrum of Individual Abilities (Report by U.S. Civil Rights Commission, 1983) 6

Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcomm. on Select Educ. of House Comm. on Educ. and Labor, 100th Cong. 132-33 (1988) 18

Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped, 101st Cong. (1989) 10, 13, 14, 15

Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before Subcomm. on Select Educ. of the House Comm. on Educ. and Labor, 101st Cong. (1989) 10

Education of the Handicapped Act, Pub. L. 91-230, Title VI, 84 Stat. 121 (1970) 18

Field Hearing on Americans with Disabilities Act: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor, 101st Cong. (1989) 15

H. R. Rep. No. 101-485, pt. 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267 ..... 12, 15

Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor, 100th Cong. 40-41 (1988) 10

S. Rep. No. 101-116 (1989) 12, 18

TABLE OF AUTHORITIES – Continued

Page

Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act 100th Cong., 2d Sess. (Comm. Print 1990).....6, 7

The Post-Garrett World: Insufficient State Protection Against Disability Discrimination, 53 Ala. L. Rev. 1075, 1112 (2002).....15, 16

135 Cong. Rec. 19,799 (1989).....16

INTEREST OF THE *AMICI CURIAE* STATES

This *amici curiae* brief is submitted on behalf of ten (10) states: Minnesota, Connecticut, Illinois, Massachusetts, Missouri, New Mexico, New York, Vermont, Washington and Wisconsin. The *amici curiae* States strongly support a finding in favor of Respondents in this case and the resulting use of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131, *et seq.* ("ADA"), by state citizens without limitation. Although the states more typically advocate the application of Eleventh Amendment immunity, this case is different. Because of the vital public policy underlying the landmark ADA legislation, in particular Title II, and because of the central role of the states in providing the public services, programs and activities subject to Title II, the *amici curiae* States, consistent with the obligation of their respective attorneys general to protect the public interest, file this *amici curiae* brief.

Where, as here, a legislative enactment constitutes a valid exercise of Congress's Section 5 power under the Fourteenth Amendment, the states have a compelling interest in the full implementation of the law. The states should support every effort to eradicate the effects of the documented long-term, pervasive and invidious discrimination against people with disabilities in the provision of public services. Citizens should not have to depend upon a waiver of immunity from the state to pursue the important rights protected by Title II. Rather, Title II's equal protection and due process-based purposes, and the *amici curiae* States' desire to eliminate discrimination against the members of our society with disabilities, mandate that citizens be empowered to enforce their Title II rights without restriction.

SUMMARY OF ARGUMENT

This Court has recognized that people with disabilities suffer discrimination resulting from irrational fears, prejudices and ignorance. *See, e.g., Alexander v. Choate,* 469 U.S. 287 (1985); *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432 (1985); *School Bd. of Nassau County v. Arline,* 480 U.S. 273 (1987). In considering Title II, Congress had before it substantial and uncontroverted evidence of state-sponsored invidious discrimination against individuals with disabilities in the provision of public services, programs and activities. Indeed, states engaged in numerous activities that unconstitutionally discriminated against individuals with disabilities. Although this Court in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), found that Title I of the ADA was not a valid exercise of Congress's Section 5 power, the *Garrett* Court's analysis was limited to conduct which is accorded only rational basis review under the Equal Protection Clause. In contrast, Title II implicates fundamental rights protected by the Equal Protection and Due Process Clauses, which are subject to heightened scrutiny, including voting and access to the courts. As it relates to Title II, the legislative record identified violations of these and other constitutionally protected rights.

In Title II, Congress provided for a congruent and proportional remedy for widespread constitutional violations by the states. As authorized by Section 5 of the Fourteenth Amendment, Title II not only proscribes unconstitutional discrimination, but also seeks to deter such discrimination. In accordance with *City of Cleburne*, 473 U.S. at 442-43, where this Court recognized that the legislative branch is in a better position than the judiciary to address disability discrimination, Congress, in enacting

Title II, tailored appropriate and balanced legislation to remedy and deter continued discrimination against people with disabilities with respect to government-provided services.

The important limitations on Title II's remedial scheme provide further evidence of Congress's congruent and proportionate response to the endemic problem of disability discrimination by the states. By imposing significant restrictions on Title II's applicability, Congress appropriately balanced the needs of the states with meaningful protection against disability discrimination in public services, programs and activities. Accordingly, Title II is a valid exercise of Congress's Section 5 power.

ARGUMENT

I. This Court's Decision In *Board Of Trustees Of The University Of Alabama v. Garrett* Is Not Determinative Of The Issue Presently Before The Court.

Unlike Title I of the ADA, Title II is a valid exercise of Congress's Section 5 power. This Court determined in *Garrett* that Congress failed to abrogate state sovereign immunity in Title I of the ADA because the record did not reflect a pattern of disability discrimination in state employment sufficient to justify application of the Title to the states, and because Congress failed to create a statutory remedy that was congruent and proportional to the targeted violation. *Board of Trs. of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 368, 374 (2001). The Court did not extend this holding, however, to Title II of the ADA, governing the provision of public services, programs and

activities. In footnote 1 of the *Garrett* opinion, this Court, recognizing Title II's distinct remedial scheme, expressly declined to decide whether Title II could survive constitutional challenge. *Id.* at 360 n.1. Moreover, while this Court found the legislative record lacking with respect to evidence of disability discrimination in state *employment*, it explicitly noted that the "overwhelming majority" of accounts of disability discrimination in the legislative record "pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA." *Id.* at 371 n.7. Unlike Title I, Title II passes muster under the *Garrett* analysis.

II. Congress Validly Abrogated The States' Sovereign Immunity When It Enacted Title II Of The ADA.

Congress validly abrogated state sovereign immunity in Title II. Congress may abrogate the states' Eleventh Amendment immunity from suit in federal court if two requirements are met. First, Congress must make its intention to abrogate "unmistakably clear in the language of the statute." *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 73 (2000) (citations omitted). Second, Congress must act in accordance with its enforcement power under Section 5 of the Fourteenth Amendment. *Garrett,* 531 U.S. at 364; *Kimel*, 528 U.S. at 80; *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 59 (1996).

In adopting Title II, Congress clearly stated its intention to abrogate the states' Eleventh Amendment immunity: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from

an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202.

Thus, the remaining issue before the Court is whether Title II of the ADA constitutes a valid exercise of Congress's Section 5 power. To be valid under Section 5, Congressional enactments "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett,* 531 U.S. at 365 (quoting *City of Boerne v. Flores,* 521 U.S. 507, 520 (1997)). In contrast to *Garrett*, and in accord with *Nevada Human Resources v. Hibbs*, __ U.S. __, 123 S. Ct. 1972 (2003), the legislative record supporting Title II sufficiently documents constitutional injuries by the states. Congress made explicit findings to that end. Moreover, shortcomings in existing laws justified Title II's enactment.

A. Congress Identified Substantial Evidence Of Irrational State Conduct Supporting Its Finding Of A History And Pattern Of State Discrimination Against People With Disabilities In The Provision Of Public Services, Programs And Activities.

The legislative record supporting Title II sufficiently documents state actions that were based on irrational stereotypes against people with disabilities and which, even under rational basis scrutiny, violate the Equal Protection Clause. *See City of Cleburne,* 473 U.S. at 450. Reports in the Congressional Record detail a long history of states sterilizing people with disabilities and restricting the rights of people with disabilities to marry, enter into contracts, retain custody of their children and obtain state-issued drivers' licenses. *See Towards Independence*

(Nat'l Council on the Handicapped, 1986); *On the Threshold of Independence* (Nat'l Council on the Handicapped, 1988); *Accommodating the Spectrum of Individual Abilities* (Report by U.S. Civil Rights Commission, 1983). For example, the record before Congress included the United States Commission on Civil Rights' report, *Accommodating the Spectrum of Individual Abilities* (1983), which details the history of state institutionalization and other policies that were applied in a discriminatory manner against people with disabilities. *Id.* at 32-37. These state practices often were unconstitutionally based on "irrational fears or ignorance, traceable to the prolonged social and cultural isolation" of people with disabilities. *See City of Cleburne*, 473 U.S. at 467 (Marshall, J., concurring and dissenting). As Justice Marshall declared: "A regime of *state-mandated* segregation . . . emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Id.* at 462 (emphasis added).

The legislative record includes various examples of state conduct devoid of any rational basis: Congress heard that a blind voter with cerebral palsy was arbitrarily refused the right to register to vote in state elections; it heard that state mental hospitals misused medications to punish and restrain their disabled, institutionalized patients; it heard that such hospitals subjected their patients to abusive treatment and inhumane conditions; it also heard that a blind woman was refused instructions on how to use her state's voting machines. *See Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess.*, 2 *Legis. Hist. of Pub. L. No. 101-336: The Americans with*

Disabilities Act 1220, 100th Cong., 2d Sess. at 1203, 1262-63 (Comm. Print 1990)[1]; Task Force on the Rights and Empowerment of Americans with Disabilities, *Alabama Submissions* 16.[2]

Bonnie O'Day, of the Independent Center of Hampton, testified to Congress that a wheelchair user plunged fifty feet to his death because he was using a makeshift path at the University of Virginia, which was physically inaccessible, lacking a barrier-free accessible route on which to travel. *Legis. Hist.* at 1076. Greg Hlibok, then president of the Student Body Government at Gallaudet University, testified that he and others who are deaf and hard of hearing had been denied medical treatment at hospitals because they could not be understood and the hospital refused to hire a qualified sign language interpreter. *Id.* at 1006. Judy Heumann, of the World Institute on Disability, was denied entry to her dorm house because of her wheelchair. After college, she was denied her teaching credential because of "paralysis." *Id.* at 1002. The record also included a statement of a mother whose deaf son was charged with speeding. The judge chose to dismiss the charges because it was "cheaper" than to provide an interpreter for the court appearance. *Task Force, Georgia Submissions* 374.

---

[1] Hereinafter referred to as "*Legis. Hist.*"

[2] This task force was appointed by the select chairman of the House Committee on Education and the final report was printed by the Government Printing Office at the behest of the Committee. The Report will be hereinafter referred to as "*Task Force.*"

The Congressional Record shows evidence of state action that would not satisfy even rational basis review, justifying application of Title II to the states.

B. In Adopting Title II, Congress Identified State Discrimination That Violated The Fundamental Constitutional Rights Of People With Disabilities.

More than showing equal protection violations subject to rational basis review, the record supporting Title II shows that discrimination by the states in public services impinged upon fundamental constitutional rights of people with disabilities, including such rights as parental rights, voting rights, access to the courts and prisoners' rights to humane conditions of confinement. Since a higher standard of scrutiny applies to these rights, Congress was justified in concluding that the record documented constitutional violations by the states.

In *Garrett*, the Court held that the record of state conduct was insufficient to justify abrogation of sovereign immunity, in part, because of the standard of review applicable to state treatment of people with disabilities, namely the rational basis test under the Equal Protection Clause.[3] The Court determined that the respondents failed to demonstrate that the identified state conduct could

[3] Because state employment is not a fundamental right and not subject to heightened scrutiny, in evaluating evidence of unconstitutional state action supporting abrogation under Title I, the *Garrett* court was able to consider only the limitations placed by rational basis review under the Equal Protection Clause on state conduct concerning people with disabilities.

never have a rational basis. In contrast to Title I's regulation of employment, Title II, which governs the provision of public services, programs and activities, addresses state conduct that impinges upon fundamental constitutional rights embodied in the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. In such a case, a higher standard of scrutiny applies. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972) (holding that right to vote can be restricted only when purpose of restriction and overriding interests served thereby meet close constitutional scrutiny); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that due process requires state to provide meaningful access to courts absent showing of countervailing state interest of overriding significance); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

In *Hibbs*, this Court recognized that where Congress directs its attention to categories that trigger a heightened level of scrutiny, it is "easier for Congress to show a pattern of state constitutional violations." 123 S. Ct. at 1982.[4] Congress succeeded in showing a pattern of state constitutional violations in support of Title II.

The record for Title II shows that people with disabilities were denied access to public facilities, including

[4] The *Hibbs* Court even found significant the record before Congress of private sector leave policies as evidence supporting a pattern of constitutional violations on the part of states in the area of family leave. 123 S. Ct. at 1979 & n.3.

courthouses, legislative assemblies, and voting places. *See* U.S. Comm'n on Civil Rights, *supra,* at 21-22, 38-39; *see also Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong., 662-64 (1989) (testimony of Mary Lynn Fletcher). This lack of access adversely impacted the ability of people with disabilities to effectively participate in the state governmental process, including the ability to exercise their right to vote[5] and to utilize the state judicial system.[6]

Congress heard that a disabled man, called to testify in court, had to get out of his wheelchair and pull himself up three flights of stairs to reach the courtroom. Task Force, *Alabama Submissions* 15. A disabled man who was to appear as a witness in a criminal trial had to be carried by state troopers up two flights of stairs because he had no other means to access the courtroom. *Id., West Virginia Submissions* 1745. A disabled woman, to reach the polls to vote in a general election, had to leave her wheelchair, walk with two canes up a flight of steps (taking 30 minutes), walk with her canes to the voting machine (taking 25 minutes), and hold on to the machine and beat on the levers with her cane to move them to cast her vote. *Id.,*

[5] *See, e.g., Hearing on H.R. 2273, Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before Subcomm. on Select Educ. of the House Comm. on Educ. and Labor,* 101st Cong. 41, 45 (1989) (testimony of Nanette Bowling, staff liaison to mayor of Kokomo, Indiana) (describing "devastating disincentives to voting" faced by people with disabilities).

[6] *See, e.g., Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor,* 100th Cong. 40-41 (1988) (statement of Emeka Nwojke) (describing barriers faced by persons with disabilities that impeded their access to courts).

Delaware Submissions 307. Dozens of people with disabilities from across the country offered statements describing the ways in which they were denied access to polling places or were otherwise hampered in their ability to cast their votes.

The facts in the present case are an example of just the sort of unconstitutional conduct presented to Congress which prompted the passage of Title II. Here, Mr. Lane, a person with paraplegia, was denied his fundamental right of access to the courts because of the courthouse's inaccessible courtrooms. Mr. Lane was required to crawl up two flights of stairs in order to satisfy the requirement to appear at his criminal arraignment. At a second court date, when Mr. Lane refused the humiliation of crawling or being carried by officers to the courtroom, he was arrested and jailed.

Like the legislative record supporting the FMLA in *Hibbs*, the legislative record supporting Title II, including evidence of violations of fundamental constitutional rights by the states, which trigger a heightened level of scrutiny, justifies Congress's judgment to apply Title II to the states.

C. Congress Made Explicit Findings Of State Discrimination Against People With Disabilities In The Provision Of Public Services, Programs And Activities.

Unlike Title I,[7] Title II is supported by express legislative findings of disability discrimination by the states. In

[7] *See Garrett,* 531 U.S. at 370-72.

the text of the statute itself, as well as in the Senate and House Committee Reports,[8] Congress made explicit findings of a history and pattern of state-sponsored discrimination in the provision of public services, programs and activities.[9] The statute expressly identifies persistent discrimination against people with disabilities in such areas of traditional state involvement as education, transportation, institutionalization,[10] health services, voting and access to public services, as well as "outright intentional exclusion, . . . segregation, and relegation to lesser *services, programs, activities*. . . ." 42 U.S.C. §§ 12101(a)(3), (5) (emphasis added).[11]

Congress's finding of a pattern of state discrimination is entitled to great deference by this Court. "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the Legislature; and if the question of what the facts

[8] The House and Senate Committee reports both make explicit conclusions with respect to discrimination in "public services." S. Rep. No. 101-116, p. 6 (1989); H. R. Rep. No. 101-485, pt. 2, p. 28 (1990).

[9] "The congressional findings in 42 U.S.C. § 12101 also serve as a useful aid for courts to discern the sorts of discrimination with which Congress was concerned." *Olmstead v. Zimring*, 527 U.S. 581, 613 (1999) (Kennedy and Breyer, JJ., concurring).

[10] *See, e.g., Olmstead*, 527 U.S. at 608 (Kennedy and Breyer, JJ., concurring) ("[T]he States have acknowledged that the care of the mentally disabled is their special obligation.").

[11] *See Olmstead*, 527 U.S. at 614 (Kennedy & Breyer, JJ., concurring) (stating that the findings in the ADA "underscore Congress' concern that discrimination has been a frequent and pervasive problem in institutional settings and policies and its concern that segregating disabled persons from others can be discriminatory").

establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker." *Radice v. New York*, 264 U.S. 292, 294 (1924). Moreover, "[g]iven the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government,'" a court does "not lightly second-guess such legislative judgments." *Board of Educ. v. Mergens*, 496 U.S. 226, 251 (1990).

D. Shortcomings In Existing Law Justified The Enactment Of Title II.

The *Hibbs* Court recognized that Congress is justified in enacting added prophylactic measures where previous legislative attempts have failed to resolve discrimination. 123 S. Ct. at 1980-81. Congress received substantial evidence showing that the existing body of laws regarding the rights of people with disabilities to access programs and activities of state governments had failed to redress pervasive discrimination.

For example, in a written statement to Congress, former Illinois Attorney General Neil Hartigan stated: "As Attorney General I have had innumerable complaints regarding lack of access to public services – people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building." *See Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 75-78 (1989). He testified regarding the persistent and widespread discrimination against people with disabilities involving, for example,

public transportation, public services, public parks, publicly owned facilities, special education and elections. *Id.* He testified that "people with disabilities should not have to fight these battles in every state," urging passage of a uniform national standard to free people with disabilities from having to win their rights on a state-by-state basis. *Id.* at 77. He further explained that any meaningful legislation to combat disability discrimination must include a remedial provision. *Id.* at 80-81.

The patchwork of state laws and confusion that resulted from the limited application of federal law militated in favor of the federal government acting to "establish uniform minimum requirements for accessibility." Sen. Subcomm. on the Handicapped of the Comm. on Labor and Human Resources, *Hearings on S. 933 To Establish a Clear and Comprehensive Prohibition of Discrimination on the Basis of Disability*, 101st Cong., 2d Sess. 75-78 (May 10, 1989). At the time that Congress was debating the ADA, federal law provided people with disabilities only the Architectural Barriers Act and the Rehabilitation Act of 1973 on which to rely for the physical and programmatic access that they required to live independently. However, both of these laws apply exclusively to buildings, programs and activities receiving federal financial assistance. Additionally, the onus was on the individual to distinguish between state, federal and private funding in every instance. Likewise, where state laws exist, they were and are limited in scope and application.[12] Even in Illinois, where Attorney General Hartigan

[12] The legislative record shows that although some states had enacted disability laws, the state statutes varied greatly and many

(Continued on following page)

boasted the most progressive of state physical accessibility statutes at the time of the hearings on the ADA, the law had no private right of action. Therefore, a person with a disability was and remains wholly dependent upon the state, with its limited staff and resources, to enforce his or her legal rights. The result is inequity and confusion for individuals with disabilities.

Scholarly research confirms that, as recently as 2002, "only twenty-four of fifty-one states have disability discrimination statutes that appear comparable to ADA Title II," with respect to prohibiting discrimination in access to both facilities *and* services, providing a private right of action, and making available compensatory damages and attorneys' fees. *See* Ruth Colker and Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075, 1112

provided little meaningful protection against disability discrimination. *See, e.g., Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 334-37 (1989) (statement of Arlene Mayerson) (describing limitations and ineffectiveness of existing state statutes); *Field Hearing on Americans with Disabilities Act: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor,* 101st Cong. 89 (1989) (statement of Hon. Chet Brooks, Texas State Senate) ("Just as with other major civil rights issues addressed by our nation in the past, basic rights for people with disabilities have to be addressed at a national level. We cannot effectively piece these protections together state by state, person by person."); *see also* H. Rep. 101-485, pt. 2, at 47 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 329 ("State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing. . . . 'Too many States, for whatever reason, still perpetuate confusion.' ") (quoting testimony of Admiral James Watkins before the House Subcommittee on Select Education and the Senate Subcommittee on the Handicapped).

(2002). In addition, the authors found that "another sixteen states offer moderate protection from state disability discrimination." *Id.* at 1112. Eleven states were determined to have very limited protection against Title II-covered discrimination, with nine of those states having "no enforcement mechanism at all against the state for public access discrimination." *Id.* at 1114.

Significantly, while Attorney General Hartigan was a vocal proponent of Title II, the congressional testimony contains no opposition by the states to abrogation of their Eleventh Amendment immunity. In fact, the ADA was affirmatively endorsed by the National Association of Attorneys General. *See* 135 Cong. Rec. 19,799 (1989).

Based on the foregoing, Congress had compelling and uncontroverted evidence of widespread state discrimination against people with disabilities in the provision of public services, programs and activities, supporting its determination to abrogate state sovereign immunity in Title II.

III. Given The Substantial Evidence Of State-Sponsored Discrimination Against People With Disabilities, Title II Is A Measured And Balanced Response To Remedy And Deter State-Perpetuated Disability Discrimination.

Title II is both congruent and proportional to the evils found by Congress. This Court has acknowledged that "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Kimel*, 528 U.S. at 80-81 (quoting *City of Boerne*, 521 U.S. at 536). This

deference reflects the often complex problems facing the legislative branch. Because "difficult and intractable problems often require powerful remedies," Section 5 does not preclude Congress from creating congruent and proportional remedies around a core of documented constitutional shortcomings. *Id.* at 88.

In the exercise of its Section 5 power, Congress may do more than simply proscribe conduct that this Court has held unconstitutional. *Hibbs*, 123 S. Ct. at 1977. Thus, legislation that deters or remedies constitutional violations may fall within the sweep of Congress's enforcement power even if, in the process, it prohibits conduct that is not itself unconstitutional. *City of Boerne*, 521 U.S. at 518. Congress is not confined to enacting legislation that merely parrots this Court's constitutional jurisprudence, but rather possesses the power under Section 5 "'both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" *Garrett,* 531 U.S. at 365 (quoting *Kimel,* 528 U.S. at 81).

Title II's application to education is a ready example of the wisdom of allowing a degree of latitude to Congress in fashioning appropriate remedies for unconstitutional state conduct.[13] Congressional testimony demonstrated

---

[13] Because of the states' pivotal role in the provision of educational services, it was reasonable for Congress to conclude that Title II must include the states within its ambit for its remedial educational goals to be effectuated. The pivotal role of the states in the provision of educational services is demonstrated in the Individuals with Disabilities in Education Act, 20 U.S.C. § 1440, *et seq.*

that individuals with disabilities were systematically denied basic educational opportunities. Although Congress had previously enacted legislation to promote educational opportunities for people with disabilities,[14] the 1983 Civil Rights Commission report determined that children with disabilities still were being deprived of an appropriate education. *See* U.S. Comm'n on Civil Rights, *supra,* at 28. Many children with disabilities simply were segregated in separate public educational facilities. *Id.* at 29. Other children with disabilities were excluded altogether from public schools for a variety of reasons, including that the children used wheelchairs, had epilepsy, or had cerebral palsy.[15] *Id.* at 27. These widespread practices necessarily had a tremendous adverse impact on the victims of the discrimination and justify remedies that extend beyond the core of unconstitutional conduct. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) (noting the importance of education in maintaining our civic institutions and "the lasting impact of its deprivation on the life of the child").[16]

---

[14] *See* 20 U.S.C. §§ 1400-1491 (originally enacted as the Education of the Handicapped Act, Pub. L. 91-230, Title VI, 84 Stat. 121, 175-188 (1970) and subsequently amended).

[15] *See* S. Rep. No. 101-116, at 7 (1989) (quoting testimony of Judith Heumann, World Institute on Disability); *Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcomm. on Select Educ. of House Comm. on Educ. and Labor*, 100th Cong. 132-33 (1988) (testimony of Barbara Waters).

[16] As this Court reasoned in *Plyler*: "The inestimable toll of that deprivation [of education] on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause." *Id.* at 222.

Title II represents a valid abrogation of sovereign immunity. First, Title II appropriately proscribes unconstitutional state conduct. Second, Title II's reasonable modification provision is consistent with states' constitutional responsibilities. Finally, the limitations Congress designed ensure that constitutional state conduct is not disproportionately proscribed.

A. Title II Reasonably Proscribes Unconstitutional State Conduct.

Title II is a valid exercise of Congress's Section 5 power because it directly targets unconstitutional state conduct. Members of this Court have recognized that Title II was designed to address unconstitutional discrimination under the Equal Protection Clause:

> Section 12132 can be understood to deem as irrational, and so to prohibit, distinctions by which a class of disabled persons, or some within that class, are, by reason of their disability and without adequate justification, exposed by a state entity to more onerous treatment than a comparison group in the provision of services or the administration of existing programs, or indeed entirely excluded from state programs or facilities.

Olmstead, 527 U.S. at 611, 613 (Kennedy and Breyer, JJ., concurring); *see also Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn*, 280 F.3d 98, 112 (2d Cir. 2001) (holding that "a private suit for money damages under Title II of the ADA may only be maintained against a state if the plaintiff can establish that the Title II violation was motivated by either discriminatory animus or ill will due to disability").

Moreover, while the Title I analysis in *Garrett* was limited to rational basis scrutiny under the Equal Protection Clause, Title II protects constitutional rights subject to heightened review under the Equal Protection and Due Process Clauses, such as the right of people with disabilities to meaningful access to the states' courts,[17] the right of people with disabilities to vote on an equal basis with other state citizens,[18] and the right of prisoners and other involuntarily institutionalized persons with disabilities to humane conditions of confinement.[19] State discrimination against people with disabilities with respect to these fundamental rights is subject to heightened review, and thus rational state conduct nevertheless could be unconstitutional. This fact was dispositive in this Court's determination that the FMLA was a valid exercise of Congress's Section 5 power. *Hibbs*, 123 S. Ct. at 1982.

Indeed, the *Garrett* Court's determination that Title I was disproportionate was premised on the limited reach of rational basis review under the Equal Protection Clause. For example, the Court noted that Title I would require an employer to modify existing facilities to accommodate a disabled employee although it would be entirely reasonable, and therefore constitutional, for the employer to

[17] *See Bounds v. Smith*, 430 U.S. 817 (1977); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

[18] *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (denying citizens the right to vote deprives them of a "fundamental political right, . . . preservative of all rights.").

[19] *See Youngberg v. Romeo*, 457 U.S. 307 (1982) (civil commitment); *Estelle v. Gamble*, 429 U.S. 1066 (1976) (medical care for prisoners).

instead choose to avoid the costs of providing accommodation by hiring employees who are able to use existing facilities. 531 U.S. at 372. In contrast, although it may be reasonable for a state to desire to avoid the cost of providing an interpreter at the trial of a hearing-impaired criminal defendant, as would be required under Title II, this choice would violate the Due Process Clause. *See, e.g., Amadon v. Immigration & Naturalization Serv.*, 226 F.3d 724 (6th Cir. 2000) (holding that incompetent interpreter at deportation hearing deprived asylum applicant of due process right to full and fair hearing). The fundamental nature of the rights at stake justifies the breadth of Title II.

Accordingly, unlike Title I, Title II serves to protect fundamental rights to which heightened scrutiny applies. Title II is therefore a proportional response to unconstitutional state conduct.

B. Title II's Reasonable Modification Provision Is Consistent With States' Responsibilities Under The Constitution.

Given the pervasiveness of past prejudices and inequitable actions by states toward individuals with disabilities, Congress determined in its legislative judgment that it was not enough merely to prohibit future unconstitutional discriminatory conduct. Rather, to remedy and deter state discrimination against people with disabilities and further implement its Section 5 power, Congress required "reasonable modifications"[20] for

[20] 42 U.S.C. § 12131(2) requires reasonable modifications to rules, policies or practices, the removal of architectural, transportation and

(Continued on following page)

qualified individuals with disabilities. A national problem of the magnitude documented by Congress and recognized by this Court, *see, e.g., City of Cleburne,* 473 U.S. at 454, 464-65, demands a solution that affirmatively prevents state-sponsored disability discrimination, provides meaningful access to public services, programs and activities, and thus integrates individuals with disabilities into public life.

In contrast to the overbreadth of the reasonable accommodation standard of Title I, which was a central part of the *Garrett* Court's analysis, Title II's analogue, reasonable modification, appropriately effectuates the states' constitutional responsibilities. The protection of fundamental rights often requires a state to do more than simply refrain from discriminating against its citizens. This and other courts have found that states are constitutionally required "to shoulder affirmative obligations" to ensure meaningful access to public services, as well as abolish barriers preventing such meaningful access.[21] *Bounds v. Smith*, 430 U.S. 817, 824-25 (1977) (holding that fundamental right of access to courts required state to provide inmates with adequate law libraries or adequate assistance from persons trained in the law; while economic

---

communication barriers, and the provision of auxiliary aids and services. The entirety of this provision will be referred to herein as the "reasonable modification provision." Regulations impose significant limitations on these requirements. *See, e.g.,* 28 C.F.R. § 35.130(b)(7).

[21] This Court, in *Plyler v. Doe*, recognized that one of the goals of the Equal Protection Clause is "the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." 457 U.S. at 221-22. The reasonable modification provision of Title II directly serves this important goal.

factors may be considered in choosing method to provide meaningful access, "the cost of protecting a constitutional right cannot justify its total denial"); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding Voting Rights Act ban on voting literacy tests although literacy tests themselves do not violate the Equal Protection Clause; destruction of this barrier enabled individuals to better "obtain 'perfect equality of civil rights and the equal protection of the laws'") (citations omitted); *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 72 (2002) (finding that state could be required to provide accommodation to hearing-impaired father in child custody proceedings both under Title II and as a matter of due process); *Amadon v. Immigration & Naturalization Serv.*, 226 F.3d 724 (6th Cir. 2000) (holding that due process right to full and fair deportation hearing required government to provide competent foreign-language interpreter).

In the same fashion as the cases cited above, Title II's "reasonable modification" provision enables people with disabilities to obtain their constitutionally guaranteed rights. Therefore, this provision is consistent with states' constitutional responsibilities.

This Court recently forcefully reiterated the importance of effectuating Congress's remedial purpose when analyzing congruence. *See Hibbs*, __ U.S. __, 123 S. Ct. 1972. The *Hibbs* Court upheld the FMLA despite its inclusion of a mandatory twelve-week leave provision. The Court recognized that without the mandatory leave, an employer could treat males and females equally by providing for no leave whatsoever, a result "which would not have achieved Congress's remedial object." *Id.* at 1983. Similarly, a simple mandate of equal treatment of the

disabled and non-disabled would fail to achieve Congress' remedial goals here. Thus, just as the twelve-week leave provision in the FMLA met the congruence factor in *Hibbs*, the reasonable modification requirement in Title II meets the congruence factor here.

C. Congress Imposed Important Limitations In Title II Which Produce A Congruent And Proportional Remedy.

This Court has found that limiting provisions in legislation "tend to ensure Congress's means are appropriate to ends legitimate under Section 5." *City of Boerne*, 521 U.S. at 533. For example, in *Hibbs*, this Court found significant the limitations Congress placed on the FMLA, including its definition of covered employee and its limitation of back pay damages to two years. 123 S. Ct. at 1983-84.

Similarly, in crafting Title II, Congress carefully considered the needs of state governments and included important limitations in the law. Title II requires only reasonable modifications that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service.[22] In addition, Title II does not apply to all individuals with physical or mental impairments, but, rather, only to those whose impairments substantially

[22] 42 U.S.C. § 12131(2); 28 C.F.R. § 35.130(b)(7).

limit their major life activities.[23] Also, similar to the FMLA, Title II limits back pay awards to two years.[24]

Title II's regulations also serve to shorten the statute's reach into constitutional conduct. For example, regulations provide that when existing facilities are inaccessible, states are not required to make structural changes so long as the programs are made available to people with disabilities in some other manner. 28 C.F.R. § 35.150(b)(1).

Moreover, this Court's interpretation of Title II reinforces the limitations Congress has designed. For example, in *Olmstead v. Zimring*, this Court recognized that Title II permits the states to rely on the reasonable assessments of their own professionals in determining whether the essential eligibility requirements for habilitation in a community-based program are met. 527 U.S. at 602. In addition, this Court has recognized that Title II's reasonable modification provision does not impose "boundless" responsibility upon the states. *Id.* at 603. For example, in the context of deinstitutionalization, this Court has construed the provision to permit states to take into account available resources and the needs of other mentally disabled persons. *Id.* at 607.

[23] 42 U.S.C. § 12102(2). *See, e.g., Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (holding that mitigating measures must be taken into account in determining ADA's coverage); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 2002 construing ADA's definition of "disability" and noting "[t]hat these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled is confirmed by the first section of the ADA, which lays out the legislative findings and purposes that motivate the Act"

[24] 42 U.S.C. § 12133 (citing 29 U.S.C. § 794a, citing 42 U.S.C. § 2000e-5(g)).

Thus, because Title II's intrusion into constitutional state conduct is minimal and states maintain substantial discretion over their provision of public services, programs and activities, Title II provides a congruent and proportional response to disability discrimination by the states.

CONCLUSION

Faced with well-documented incidents of state discrimination against people with disabilities in public services, Congress designed a comprehensive and integrated response that recognized the states' central role in the provision of such services. Unlike Title I, Title II of the ADA involves an area of regulation for which people with disabilities have no options. That is, in contrast to employment, governments are the sole suppliers of public services. Because of the states' central role in the provision of public services, a limitation on the ability of people with disabilities to enforce Title II against the states may substantially diminish Title II's effectiveness. In this situation, the Court should grant Congress reasonable latitude in crafting remedies that people with disabilities can use without restriction.

For the foregoing reasons, this Court should find in favor of the Respondents and hold that Congress, in enacting Title II of the ADA, validly abrogated the states'

sovereign immunity pursuant to Section 5 of the Fourteenth Amendment.

Dated: November 12, 2003

Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota
Counsel of Record

GARY R. CUNNINGHAM
KRISTYN M. ANDERSON
Assistant Attorneys General

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 282-5705 (Voice)
(651) 296-1410 (TTY)

Attorneys for Amici Curiae States

Supreme Court, U.S.
FILED
NOV 12 2003
OFFICE OF THE CLERK

No. 02-1667

In The Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

GEORGE LANE, BEVERLY JONES, AND UNITED STATES OF AMERICA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE STATES OF KANSAS AND DELAWARE *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

STATE OF KANSAS
Office of the Attorney General
Memorial Bldg., 2nd Floor
120 SW 10th Avenue
Topeka, Kansas 66612-1597
(785) 296-2215

PHILL KLINE
Kansas Attorney General

RALPH JAMES DEZAGO
Assistant Attorney General
Counsel of Record

DAVID W. DAVIES
Deputy Attorney General

HARRY KENNEDY
Assistant Attorney General

STATE OF DELAWARE
Office of the Attorney General
820 N. French Street
Wilmington, Delaware 19801
(302) 577-8400

M. JANE BRADY
Delaware Attorney General

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

27 pp

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICI CURIAE* STATES	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. Fundamental Rights Under The Due Process Clause Are Distinguishable From Equal Protection-Based Concerns And Are Entitled To Greater Protections From Interference By Government, Including A Protection Against Application Of Eleventh Amendment Immunity.....	4
II. Congress Found Ample Evidence Of A Problem Of Unconstitutional Treatment Of Individuals With Disabilities, Specifically As To The Exercise Of Fundamental Rights, And, Therefore, When Enacting Title II Of The ADA, Validly Abrogated The States' Eleventh Amendment Immunity As To Fundamental Rights.	6
A. Historic and Enduring Discrimination of Fundamental Rights.....	7
B. Access to the Courts	9
C. Voting	10
D. Fourth Amendment Rights	12
E. Parenting Rights	13
F. Licensing	14
G. Eighth Amendment Violations.....	14
III. Congress Validly Abrogated The States' Eleventh Amendment Immunity In Terms Of Violations Of Fundamental Rights.....	15

TABLE OF CONTENTS – Continued

Page

A. Congress Made its Intention Clear in the Language of the Act..... 15

B. Congress Acted in Accordance with its Enforcement Power Under Section 5 of the Fourteenth Amendment. 16

C. Abrogation of States' Immunity Is Congruent and Proportional..... 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712 (1985)..... 2

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 121 S.Ct. 955 (2001) .....*passim*

Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct 780 (1971).....5, 9

City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157 (1997).....5, 16

City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).....2, 8

Clark v. Jeter, 486 U.S. 456, 108 S.Ct. 1910 (1998).....17

Evans v. Cornman, 398 U.S. 419, 90 S.Ct. 1752 (1970).....10

Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970 (1994).....14

Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970).....13

Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 120 S.Ct. 631 (2000).....15

Lane v. Tennessee, 315 F.3d 680 (6th Cir. 2003).....2, 9, 10, 17, 18

Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S.Ct. 1076 (1974) 5

Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932 (1977)..... 2

Parrish v. Johnson, 800 F.2d 600 (6th Cir. 1986).....15

TABLE OF AUTHORITIES – Continued

Page

Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382 (1982) 4

Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808 (6th Cir. 2002) 2, 3, 16, 17, 18

Reno v. Flores, 507 U.S. 292, 113 S.Ct. 1439 (1993) 4

Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1964) 5, 10

Rhodes v. Chapman, 452 U.S. 337, 101 S.Ct. 2392 (1981) 14

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814 (1980) 9

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278 (1973) 5

School Bd. of Nassau County v. Arline, 480 U.S. 273, 107 S.Ct. 1123 (1987) 2

Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 116 S.Ct. 1114 (1996) 15

Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322 (1969) 17

Skinner v. State of Okla. ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110 (1942) 5

Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208 (1972) 13

Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099 (1978) 8

Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054 (2000) 4, 13, 17

TABLE OF AUTHORITIES – Continued

Page

Vacco v. Quill, 521 U.S. 793, 117 S.Ct. 2293 (1997) 5

Washington v. Glucksberg, 521 U.S. 702, 117 S.Ct. 2258 (1997) 2, 4

Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886) 10

Zablocki v. Redhail, 434 U.S. 374, 98 S.Ct. 673 (1978) 5

STATUTES/OTHER AUTHORITIES

42 U.S.C. § 12101(a)(7) 10

42 U.S.C. § 12101(a)(3) 10

42 U.S.C. §§ 12131-12165 1

42 U.S.C. § 12202 15

K.S.A. 25-1234 7

K.S.A. 23-120 7

Americans with Disabilities Act of 1989: Hearings on S. 933 before the Subcomm. on the Handicapped and the Senate Comm. on Labor & Human Res., 101st Cong., 1st Sess. 76 (1989) (May 1989 Hearings) 11

California Att'y Gen., Comm'n on Disability: Final Report 17 (Dec. 1989) 13

Equal Access to Voting for Elderly & Disabled Persons: Hearings Before the Task Force on Elections of the House Comm. on House Admin., 98th Cong., 1st Sess. 94 (1984) 11

TABLE OF AUTHORITIES – Continued

Page

M. Burgdorf & R. Burgdorf, A History of Unequal Treatment, 15 Santa Clara lawyer 855, 863 (1974) 7

Governor J. Kitzhaber, Proclamation of Human Rights Day and Apology for Oregon's Forced Sterilization (Dec. 2, 2002) 8

New Mexico, Official 2002 General Election Results by Office (Dec. 2002) 8

P. Reilly, The Surgical Solution 2, 148 (1991) 8

National Public Radio, Look Back at Oregon's History of Sterilizing Residents of State Institutions (Dec. 2, 2002) 8

2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act 1040 (Comm. Print 1990) ..... *passim*

Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment 16 (1990) 6, 12, 13, 14

H.R. Rep. No. 485, Pt. 2 14

S. Rep. No. 116 11

INTEREST OF THE *AMICI CURIAE* STATES

This *amici curiae* brief is submitted on behalf of the *amici curiae* States of Kansas and Delaware. The *amici curiae* States support a finding by the United States Supreme Court in favor of Respondents on a limited basis.

In this brief, the *amici curiae* advocate that Congress validly abrogated the various states' Eleventh Amendment sovereign immunity when it enacted Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 ("ADA"). However, the *amici curiae* also advocate that Congress abrogated Eleventh Amendment immunity protection relative to Title II of the ADA *only to the extent said immunity obstructs the pursuit or enforcement of fundamental due process rights*. Moreover, the *amici curiae* advocate that Congress did not validly abrogate the states' Eleventh Amendment immunity protection as to equal protection-based claims under Title II because doing so would *not* have been a "congruent and proportional" remedy, would have overstepped Congress' enforcement powers, and would have been in direct conflict with long-standing constitutional mandates.

The *amici curiae* recognize that fundamental due process-based rights such as access to the courts, voting, and privacy issues, represent crucial and historically significant rights. The *amici curiae* also recognize that the states should be leading the fight to eliminate discrimination against persons with disabilities as to the exercise of their fundamental rights. Therefore, in order to encourage full pursuit and protection of fundamental rights, the states should not be immune from damage claims brought

by individuals under Title II of the ADA for violations that implicate a citizen's fundamental due process rights.

SUMMARY OF THE ARGUMENT

This Court has recognized that people with disabilities suffer discrimination resulting from irrational fears, prejudices and ignorance. *See, e.g., Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712 (1985); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 107 S.Ct. 1123 (1987). Unfortunately, people with disabilities have suffered discrimination in areas that directly affect fundamental due process rights. *See Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) and the instant case *Lane v. Tennessee*, 315 F.3d 680 (6th Cir. 2003). These fundamental rights are "deeply rooted in this Nation's history and tradition." *See Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S.Ct. 2258, 2267-68 (1997) (*quoting Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 1938 (1977)). As such, it is imperative that the states strive to eliminate discrimination that affects these fundamental rights. One way of doing so is to recognize the fact that Congress validly abrogated the states' Eleventh Amendment immunity, in terms of these fundamental rights, when it enacted Title II of the ADA.

It is clear that Congress, when enacting the ADA, held numerous hearings and documented the past history of discrimination against disabled persons, including significant testimony in the legislative record regarding infringement of fundamental rights. It is also clear that, in addition to hearing testimony and gathering evidence

related to infringement of fundamental rights, Congress also heard testimony and gathered evidence related to equal protection-based concerns.

While any discrimination exhibited against a class of persons is abhorrent, Congress does not have the authority, as Respondents and certain *amici* suggest, to create new suspect or quasi-suspect classes in order to address equal protection-based concerns like those reviewed and documented in the legislative record during passage of the ADA. However, Congress does have the authority to address barriers or discrimination affecting fundamental rights due to the heightened scrutiny attributed to fundamental rights.

In enacting Title II, Congress provided for a congruent and proportional remedy for widespread constitutional violations by the states in terms of fundamental rights. It is clear that Congress initiated Title II legislation to remedy and deter continued discrimination against people with disabilities with respect to governmental functions in the area of fundamental rights. Accordingly, as limited to these fundamental rights, Title II was a valid exercise of Congress' Section 5 power.

In enacting Title II, Congress did not go so far as enacting the same congruent and proportional legislative remedies when equal protection-based purposes are concerned. This is so, because any attempt to do so would have exceeded Congress' enforcement powers – essentially carving out a new protected class of persons – and would have been in direct violation of the Constitution. *See Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002).

ARGUMENT

I. Fundamental Rights Under The Due Process Clause Are Distinguishable From Equal Protection-Based Concerns And Are Entitled To Greater Protections From Interference By Government, Including A Protection Against Application Of Eleventh Amendment Immunity.

Fundamental rights under the Due Process clause, as documented in the legislative record during passage of the ADA, are distinguishable from equal protection-based concerns documented in the same record.

This Court has "long recognized that the Fourteenth Amendment's Due Process Clause, like its Fifth Amendment counterpart, 'guarantees more than fair process.'" *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060 (2000) (*quoting Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258, 2267 (1997)). The Due Process Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.*; *see also Reno v. Flores*, 507 U.S. 292, 301-02, 113 S.Ct. 1439, 1447 (1993). Statutes affecting fundamental constitutional rights must be drawn with precision and must be tailored to serve their legitimate objectives; if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state must choose the least restrictive means. *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382 (1982), *reh'g denied*, 458 U.S. 1131 (1982).

In determining whether a particular state law infringes on a fundamental right or interest so as to require strict judicial scrutiny, the United States Supreme Court

does not pick out particular human activities or conduct, characterize them as "fundamental," and give them added protection, rather, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 31, 93 S.Ct. 1278, 1296 (1973), *reh'g denied*, 411 U.S. 959 (1973). The equal protection clause "creates no substantive rights," but rather, "it embodies general rule that states must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799, 117 S.Ct. 2293, 2297 (1997). This Court has also confirmed "the long-settled principle that it is the responsibility of the Court, not Congress, to define the substance of constitutional guarantees." *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 365, 121 S.Ct. 955, 963 (2001) (*citing City of Boerne v. Flores*, 521 U.S. 507, 519-24, 117 S.Ct. 2157, 2163-67 (1997)).

The *amici curiae* advocate that fundamental rights that must be protected by eliminating the States' application of Eleventh Amendment Immunity include: **the right to vote** *Reynolds v. Sims*, 377 U.S. 533, 561-62, 84 S.Ct. 1362, 1381 (1964); **access to the courts** *Boddie v. Connecticut*, 401 U.S. 371, 378-79, 91 S.Ct 780, 786-87 (1971); **certain privacy rights**, including the right of **procreation** *Skinner v. State of Okla. ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110 (1942), and the **right to marry** *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673 (1978); and **interstate travel** *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076 (1974).

Violations of these fundamental rights, including acts of discrimination affecting these fundamental rights, must be eliminated. That is exactly what Congress attempted to

do when it enacted Title II of the ADA and validly abrogated the States' Eleventh Amendment immunity as to fundamental rights.

II. Congress Found Ample Evidence Of A Problem Of Unconstitutional Treatment Of Individuals With Disabilities, Specifically As To The Exercise Of Fundamental Rights, And, Therefore, When Enacting Title II Of The ADA, Validly Abrogated The States' Eleventh Amendment Immunity As To Fundamental Rights.

Congress engaged in extensive study and fact-finding concerning the problem of discrimination against persons with disabilities and set forth in the legislative record a history of discrimination against disabled persons as to their fundamental rights.[1]

[1] Congress held 13 hearings devoted specifically to consideration of the Disabilities Act. *See Garrett*, 531 U.S. at 389-90 (Breyer, J., dissenting) (listing hearings). In addition, a congressionally designated Task Force held 63 public forums across the country that were attended by more than 30,000 individuals. *See* Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment 16 (1990) (Task Force Report). The Task Force presented evidence to Congress submitted by nearly 5,000 individuals documenting the problems with discrimination persons with disabilities face daily – often at the hands of state and local governments. *See* 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act 1040 (Comm. Print 1990) (Leg. Hist.). *See also* Task Force Report 16. The Task Force submitted those "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life" to Congress, 2 Leg. Hist. 1324-25, as part of the official legislative history of the Disabilities Act. *See id.* at 1336, 1389. In *Garrett*, the United

(Continued on following page)

A. Historic and Enduring Discrimination of Fundamental Rights

Numerous States have restricted the rights of physically disabled people tc enter into contracts. United States Civil Rights Comm'n Accommodating the Spectrum of Individual Abilities (Spectrum) 40. Until 1977, the State of Kansas prevented marriage between developmentally disabled persons. *See* K.S.A. 23-120.

Amazingly, some cities enacted "ugly laws," that prohibited the physically disabled from appearing in public. M. Burgdorf & R. Burgdorf, A History of Unequal Treatment, 15 Santa Clara lawyer 855, 863 (1974). Chicago's law provided:

> No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places in this city, shall therein or thereon expose himself to public view, under a penalty of not less than one dollar nor more than fifty dollars for each offense.

Id. (*quoting* ordinance).

Additionally, until 1968, the State of Kansas required a disabled person to provide a doctor's note or statement if that person could not register to vote in person. *See* K.S.A. 25-1234.

States lodged with the Clerk a complete set of those submissions. *See* 531 U.S. at 391-424 (Breyer, J., dissenting).

The involuntary sterilization of the disabled is not distant history; it continued into the 1970s, and occasionally even into the 1980s – well within the lifetime of many current governmental decision makers. P. Reilly, The Surgical Solution 2, 148 (1991) (Reilly); National Public Radio, Look Back at Oregon's History of Sterilizing Residents of State Institutions (Dec. 2, 2002). As recently as 1983, fifteen States continued to have compulsory sterilization laws on the books. Spectrum 37; *see also Stump v. Sparkman*, 435 U.S. 349, 351, 98 S.Ct. 1099 (1978) (Indiana judge ordered the sterilization of a "somewhat retarded" 15 year old girl); Reilly at 148-60.

Until the late 1970s, "peonage was a common practice in [Oregon] institutions." Governor J. Kitzhaber, Proclamation of Human Rights Day and Apology for Oregon's Forced Sterilization (Dec. 2, 2002). As of 1979, "most States still categorically disqualified 'idiots' from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials." *Cleburne*, 473 U.S. at 464 (Marshall, J., concurring). New Mexico recently reaffirmed its unqualified exclusion of "idiots [and] insane persons" from voting. New Mexico, Official 2002 General Election Results by Office (Dec. 2002).

It is evident from the legislative record that Congress discerned a substantial risk that persons with disabilities will be unconstitutionally denied the opportunity to exercise fundamental rights. Therefore, the *amici curiae* advocate that the enactment of Title II abrogated the States' sovereign immunity regarding fundamental rights.

B. Access to the Courts

The Fourteenth Amendment protects the rights of civil litigants, criminal defendants, and members of the public to have access to the courts. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814 (1980); *see also Boddie v. Connecticut*, 401 U.S. 371, 378-79, 91 S.Ct 780, 786-87 (1971). Yet Congress learned that "[t]he courthouse door is still closed to Americans with disabilities" – literally. 2 Legislative History of the Americans with Disabilities Act (Leg. Hist.) 936 (Sen. Harkin).

> "I went to the courtroom one day and *** I could not get into the building because there were about 500 steps to get in there. Then I called for the security guard to help me, who *** told me there was an entrance at the back door for the handicapped people. *** I went to the back door and there were three more stairs for me to get over to be able to ring a bell to announce my arrival so that somebody would come and open the door and maybe let me in. *** This is the court system that is supposed to give me a fair hearing. It took me 2 hours to get in. *** And when [the judge] finally saw me in the courtroom, he could not look at me because of my wheelchair. *** The employees of the courtroom came back to me and told me, 'You are not the norm. You are not the normal person we see every day.'"

Id. at 1070-1071 (Emeka Nwojke).

Such differential treatment affects not only the ability to get into the courthouse, but also the ability to be heard and participate effectively and meaningfully in judicial proceedings. For instance, in this case, Respondent Lane was summoned to appear at the Polk County Courthouse in Benton, Tennessee. *Lane v. Tennessee*, 315 F.3d 680 (6th

Cir. 2003) (No. 98-6730). All court proceedings in that courthouse took place on the second floor. *Id.* At his first appearance, Lane crawled up the stairs to the courtroom where he was arraigned and ordered to appear at a later date for his hearing. *Id.* Lane returned for the hearing, but refused to climb to the courtroom and refused to be carried by officers. *Id.* The court then ordered Lane's arrest and he was jailed. *Id.* Such egregious intrusion on a person's fundamental rights should not be protected under the guise of Eleventh Amendment immunity.

C. Voting

This Court has stated that "[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 561-62, 84 S.Ct. 1362, 1381 (1964); *Evans v. Cornman*, 398 U.S. 419, 422, 90 S.Ct. 1752, 1755 (1970) ("moreover, the right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges" *citing Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071 (1886)).

However, in making its findings relative to enactment of the ADA, Congress found that persons with disabilities have been "relegated to a position of political powerlessness," 42 U.S.C. § 12101(a)(7), and continue to be subjected to discrimination in voting. 42 U.S.C. § 12101(a)(3). Congress made such findings after hearing testimony that "people with disabilities have been turned away from the

polling places after they have been registered to vote because they did not look competent." 2 Leg. Hist. 1220 (Nancy Husted-Jensen).

Furthermore, Congress learned that when one witness turned in the registration card of a voter who has cerebral palsy and was blind, the "clerk of the board of canvassers looked aghast and said to me, 'Is that person competent? Look at that signature,'" and then invented a reason to reject the registration. *Id.* at 1219. Additionally, one deaf voter was told that "you still have to be able to use your voice" to vote. Equal Access to Voting for Elderly & Disabled Persons: Hearings Before the Task Force on Elections of the House Comm. on House Admin., 98th Cong., 1st Sess. 94 (1984) (Equal Voting Hearings).

Another voter with a disability was "told to go home once when I came to the poll and found the voting machines down a flight of stairs with no paper ballots available;" on another occasion that voter "had to shout my choice of candidates over the noise of a crowd to a precinct judge who pushed the levers of the machine for me, feeling all the while as if I had to offer an explanation for my decisions." Equal Voting Hearings 45. *See also Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) (*citing* additional examples).

The legislative record also documented that many persons with disabilities "cannot exercise one of your most basic rights as an American" because polling places or voting machines are inaccessible. *See* S. Rep. No. 116 at 12. As a consequence, persons with disabilities "were forced to vote by absentee ballot before key debates by the candidates were held." *Id.*; *see also* Americans with Disabilities Act of 1989: Hearings on S. 933 before the Subcomm. on

the Handicapped and the Senate Comm. on Labor & Human Res., 101st Cong., 1st Sess. 76 (1989) (May 1989 Hearings). Voting by absentee ballot also "deprives the disabled voter of an option available to other absentee voters, the right to change their vote by appearing personally at the polls on election day." 2 Leg. Hist. 1745 (Nanette Bowling).

D. Fourth Amendment Rights

The legislative history of the passage of the ADA, demonstrated that persons with disabilities have been victimized in their dealings with law enforcement, in violation of their Fourteenth Amendment right to due process and Fourth Amendment protection from unreasonable searches and seizures.

When police in Kentucky learned that a man they arrested had AIDS, "[i]nstead of putting the man in jail, the officers locked him inside his car to spend the night." 2 Leg. Hist. 1005 (Belinda Mason). Police also refused to accept a rape complaint from a blind woman because she could not make a visual identification. Task Force Report (NM 1081).[2] A person in a wheelchair was given a ticket and six months probation for obstructing traffic on the street, even though the person could not use the sidewalk because it lacked curb cuts. *Id.* (VA 1684).

[2] *See* supra footnote 1, describing Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment (Task Force Report). In *Garrett*, the complete set of Task Force submissions were cited by state and bates stamp number. *See Garrett*, 531 U.S. at 391-424.

Task Force Chairman Justin Dart testified, moreover, that persons with hearing impairments "have been arrested and held in jail over night without ever knowing their rights nor what they are being held for." 2 Leg. Hist. 1331. A parole agent "sent a man who uses a wheelchair back to prison since he did not show up for his appointments even though *** he could not make the appointments because he was unable to get accessible transportation." California Att'y Gen., Comm'n on Disability: Final Report 17, 81 (Dec. 1989). Other instances of discrimination revealed in the legislative record included situations where 1) a sheriff threatened persons with disabilities who stop in town due to car trouble, 2 Leg. Hist. 1115 (Paul Zapun); 2) a police officer taunted witness by putting a gun to her head and pulling the trigger on an empty barrel, "because he thought it would be 'funny' since I have quadraparesis and couldn't flee or fight;" *Id.* at 1197 and 3) six wheelchair users arrested for failing to leave restaurant after manager complained that "they took up too much space." Task Force Report 21.

E. Parenting Rights

This Court has long recognized that the Constitution protects and respects the sanctity of the parent-child relationship. *See, e.g., Troxel v. Granville*, 530 U.S. 57 (2000); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972). In addition, the Due Process Clause requires States to afford individuals with disabilities fair child custody proceedings, including the opportunity to be heard "at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011 (1970). Another government agency refused to authorize a couple's adoption of a child solely because the woman had

muscular dystrophy. Task Force Report (MA 829). "[B]eing paralyzed has meant far more than being unable to walk – it has meant being *** deemed an 'unfit parent'" in custody proceedings. H.R. Rep. No. 485, Pt. 2, at 41. "Historically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent." 2 Leg. Hist. 1611 n.10 (Arlene Mayerson).

F. Licensing

The hearings on the ADA documented evidence of a woman who was denied a teaching credential, not because of her substantive teaching skills, but because of her paralysis. H.R. Rep. No. 485, supra, Pt. 2, at 29. *See also* 2 Leg. Hist. 1611 n.9 (Arlene Mayerson) (teaching license denied "on the grounds that being confined to a wheelchair as a result of polio, she was physically and medically unsuited for teaching"); Task Force Report (CA 261) (discrimination in licensing teachers); *Id.* (TX 1549) (state licensing requirements for teaching deaf students include the ability to hear); *Id.* (TX 1528 & 1542) (interpreters and readers not allowed for licensing exams); *Id.* (TX 1543) (blind applicant not allowed to take state chiropractor's exam because she could not read x-ray without assistance).

G. Eighth Amendment Violations

The Eighth Amendment protects inmates with disabilities against treatment that is deliberately indifferent to their serious medical needs and safety or imposes wanton suffering. *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970 (1994); *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392 (1981). But Congress heard that "their jailers rational[ize] taking away their wheelchairs as a

form of punishment as if that is different than punishing prisoners by breaking their legs." 2 Leg. Hist. 1190 (Cindy Miller). Another prison guard repeatedly assaulted paraplegic inmates with a knife, forced them to sit in their own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead." *Parrish v. Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986).

III. Congress Validly Abrogated The States' Eleventh Amendment Immunity In Terms Of Violations Of Fundamental Rights.

Congress validly abrogated state sovereign immunity in Title II with regard to the fundamental rights discussed above. Congress may abrogate the States' Eleventh Amendment immunity from suit in federal court if two requirements are met. First, Congress must make its intention to abrogate "unmistakably clear in the language of the statute." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73, 120 S.Ct. 631 (2000) (citations omitted). Second, Congress must act in accordance with its enforcement power under Section 5 of the Fourteenth Amendment. *Garrett*, 531 U.S. at 364; *Kimel*, 528 U.S. at 80; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59, 116 S.Ct. 1114 (1996).

A. Congress Made its Intention Clear in the Language of the ADA.

In adopting Title II, Congress clearly stated its intention to abrogate the States' Eleventh Amendment immunity: "A State shall not be immune under the Eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202.

Therefore, the remaining issue before the Court is whether Title II of the ADA constitutes a valid exercise of Congress' Section 5 power.

B. Congress Acted in Accordance with its Enforcement Power Under Section 5 of the Fourteenth Amendment.

To be valid under Section 5, Congressional enactments "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 531 U.S. at 365 (*quoting City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)). As discussed, Congress, in enacting Title II of the ADA, identified the history of discrimination as to fundamental rights. Congress then sought to remedy discrimination against those fundamental rights by enacting legislation that was "congruent and proportional" in light of the heightened standard of scrutiny attributed to those fundamental rights.

C. Abrogation of States' Immunity Is Congruent and Proportional.

In *Garrett*, this Court found that Title I is not congruent with the Equal Protection Clause because it greatly expands "discrimination" liability by creating a very large new suspect class of plaintiffs. *Popovich*, 276 F.3d at 812. Further, in the *Garrett* decision the majority of this Court established that disability discrimination deserves a rational basis review and that Congress may not go beyond this standard in applying the Equal Protection Clause by imposing new liabilities on the States by creating a new

suspect class. *Id.* This rationale should apply equally to Title I and Title II of the ADA.

The constitutional balance under Title II, however, is quite different. Title II, unlike Title I, encompasses various due process type claims with varying standards and is not limited to Equal Protection. Much of the identified state conduct interferes with or threatens the fundamental rights of individuals with disabilities. Such violations are subject to a more intense scrutiny and persons, regardless of class status, cannot be excluded from voting, participating in court proceedings or raising their children "unless shown to be necessary to promote a compelling governmental interest." *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322 (1969), *overruled in part on other grounds, Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347 (1974); *see also Troxel*, 530 U.S. at 65 (plurality opinion); *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910 (1988). Congress is well within its express authority under Section 5 to require states to accommodate disabilities as Congress is enforcing the Due Process right rather than expanding it. *Popovich*, 276 F.3d at 815.

In the present case before the Court, Respondent Lane, who is a person with quadriplegia and uses a wheelchair for mobility, found himself in the Polk County Courthouse. *Lane v. Tennessee*, 315 F.3d 680. The court room in which Respondent was to appear was located on the second floor, with no elevators to provide access to the upper floors of the Courthouse. *Id.* The Respondent at a previous hearing faced with this circumstance was forced to drag himself up two flights of stairs. *Id.* On the occasion, which led to this cause of action, the Respondent, when given the choice to either again drag himself to the second floor or endure the prospect of being carried, refused and was subsequently arrested and jailed upon the

court's order. *Id.* Respondent was denied the opportunity to meaningfully participate in an adversary court proceeding. *Id.* Consequently, as evidenced in the instant case, a state's failure to accommodate Plaintiff's disability may greatly increase the risk of error in proceeding, precluding one side from responding to charges made by the opposing party, an essential element of our adversary proceeding. *Popovich*, 276 F.3d at 815.

Congress properly abrogated States' Eleventh Amendment immunity for citizens' fundamental rights. Such an abrogation would be congruent and proportional as Congress was not creating a new suspect class as cited in *Garrett*; or creating new liabilities for the states. Rather, it was merely enforcing rights that already exist for all citizens, due to the heightened scrutiny associated the those rights, that are expressly contained within or implicitly implied in the text of the Constitution.

The Petitioner's action should be barred by the Eleventh Amendment insofar as the action relied on Congressional enforcement of the Equal Protection Clause, however, it should not be barred insofar as any abrogation would rely upon the congressional enforcement for the Due Process Clause. *Popovich*, 276 F.3d at 812.

CONCLUSION

Faced with well-documented incidents of state discrimination against people with disabilities affecting fundamental Due Process rights, Congress enacted a comprehensive and legislative response that recognized the States' central role in the provision of fundamental government functions, such as access to the courts, voting, and the ability to petition government officials.

Title II involves, in part, an area of regulation for which people with disabilities have no options. That is, governments have a central role in providing fundamental government functions, and should strive to ensure that those functions are performed in a manner that does not impede the fundamental rights of its citizens.

Because of the states' central role, a limitation on the ability of people with disabilities to enforce Title II against the States, in terms of pursuing the enforcement and protection of fundamental rights, may substantially diminish Title II's effectiveness. In this limited situation, the Court should grant Congress reasonable latitude in crafting remedies that people with disabilities can use without restriction.

For the foregoing reasons, this Court should find in favor of the Respondents and hold that Congress, pursuant to Section 5 of the Fourteenth Amendment, in enacting Title II of the ADA, validly abrogated the states' sovereign immunity as to issues affecting fundamental due process rights.

Dated: November 12, 2003

Respectfully submitted,

PHILL KLINE
Kansas Attorney General

M. JANE BRADY
Delaware Attorney General

RALPH JAMES DEZAGO
Assistant Attorney General
Counsel of Record

DAVID W. DAVIES
Deputy Attorney General

HARRY KENNEDY
Assistant Attorney General

Attorneys for Amici Curiae States Kansas and Delaware

Supreme Court, U.S.
FILED
NOV 12 2003
OFFICE OF THE CLERK

No. 02-1667

IN THE

Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

GEORGE LANE, BEVERLY JONES, AND UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE TRAINING AND ADVOCACY SUPPORT CENTER OF THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

SHARON MASLING
NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS
900 Second Street, N.E.
Washington, D.C. 20002
(202) 408-9514

JOHN TOWNSEND RICH*
JAMES CHAD OPPENHEIMER
DAVID M. BOOTH
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington D.C. 20036
(202) 828-2000

Counsel for Amicus Curiae

* Counsel of Record

November 12, 2003

39 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY 2

ARGUMENT 5

I. The ADA Provides Protection With Respect to Both State Facilities and State Services 5

II. When the ADA Was Enacted, Individual State Laws Failed To Ensure Persons with Disabilities Access to State Facilities. 8

A. Remedies With Respect to State Facilities 8

1. Private Right of Action for Damages 9

2. Attorney's Fees 12

B. Coverage of State Facilities 14

III. When the ADA Was Enacted, Individual State Laws Failed To Protect Persons with Disabilities Against Discrimination in the Provision of State Services. 17

A. Coverage of State Services 17

B. Limitations in Coverage of State Services 20

1. Definition of Persons with Disabilities 21

2. Reasonable Modification 23

3. Remedies 25

IV. Invalidating Title II of the ADA Would Severely Undermine the Protections Currently Afforded to Persons with Disabilities in a Majority of States. 27

CONCLUSION 29

TABLE OF AUTHORITIES

CASES:

Alexander v. *Choate*, 469 U.S. 287 (1985) 25
Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975) 13
Barden v. *City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2639 (2003) 4
Barnes v. *Gorman*, 536 U.S. 181 (2002) 7
Bd. of Trs. of the Univ. of Ala. v. *Garrett*, 531 U.S. 356 (2001) 2
Bivens v. *Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388 (1971) 10
Black v. *Dep't of Mental Health*, 100 Cal. Rptr. 2d 39 (Ct. App. 2000) 10, 18
City of Cleburne v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) 21
City of Colo. Springs v. *Conners*, 993 P.2d 1167 (Colo. 2000) 11
Davis v. *Flexman*, 109 F. Supp. 2d 776 (S.D. Ohio 1999) 20
Doe v. *Div'n of Youth & Family Servs.*, 148 F. Supp. 2d 462 (D.N.J. 2001) 12, 15, 18
Doe v. *Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001) 7
Fell v. *Spokane Transit Authority.*, 911 P.2d 1319 (Wash. 1996) 19
Johnson v. *Tufton Group, Inc.*, No. CIV. L-99-144, 2001 WL 210046 (D. Md. Feb 28, 2001) 11
Kimel v. *Fla. Bd. of Regents*, 528 U.S. 62 (2000) 3
Kinney v. *Yerusalim*, 9 F.3d 1067 (3d Cir. 1993) 14
Lovell v. *Chandler*, 303 F.3d 1039 (9th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003) 8
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 10
Nev. Dep't of Human Resources v. *Hibbs*, 123 S. Ct. 1972 (2003) 4, 16

New York ex. rel. Spitzer v. *County of Schoharie*, 82 F. Supp. 2d 19 (N.D.N.Y. 2000) 7
Newman v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) 12–13
Olmstead v. *L.C., ex rel. Zimring*, 527 U.S. 581 (1999) 7
Owen v. *City of Independence*, 445 U.S. 622 (1980) 9
Pa. Dep't of Corr. v. *Yeskey*, 524 U.S. 206 (1998) 7
School Bd. v. *Arline*, 480 U.S. 273 (1987) 21
State v. *Haskell*, 621 N.W.2d 358 (N.D. 2001) 27
Sutherland v. *Nationwide Gen. Ins. Co.*, 657 N.E.2d 281 (Ohio Ct. App. 1995) 13, 14
US Airways, Inc. v. *Barnett*, 535 U.S. 391 (2002) 24
Wong v. *Regents of the Univ. of Calif.*, 192 F.3d 807 (9th Cir. 1999) 7

FEDERAL STATUTES:

Americans with Disabilities Act:
Section 2(a)(3), 42 U.S.C. § 12101(a)(3) 2
Section 2(a)(4), 42 U.S.C. § 12101(a)(4) 2
Section 2(a)(5), 42 U.S.C. § 12101(a)(5) 2
Section 2(a)(9), 42 U.S.C. § 12101(a)(9) 2
Section 3(2), 42 U.S.C. § 12102(2) 22, 23
Section 201(2), 42 U.S.C. § 12131(2) 24
Section 202, 42 U.S.C. § 12132 ..... 2, 4, 6, 24
Section 203, 42 U.S.C. § 12133 ..... 7, 9
Section 204(a), 42 U.S.C. § 12134(a) 24
Section 204(b), 42 U.S.C. § 12134(b) 6
Section 204(c), 42 U.S.C. § 12134(c) 6
Section 505, 42 U.S.C. § 12205 ..... 7, 9, 13
Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d *et seq.* 7
Civil Rights Attorney's Fees Awards Act of 1976 13
Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 3–4

Rehabilitation Act of 1973:
Section 504, 29 U.S.C. § 794 ..... 6, 21
Section 505, 29 U.S.C. § 794a 6–7
Rev. Stat. § 722(b), 42 U.S.C. § 1988(b) 13

STATE STATUTES:

Ala. Code § 21-4-4 (1990) 10
Ala. Code § 21-4-7 (1990) 10
Ala. Code § 21-7-3 (1990) 10, 19, 22, 23
Ala. Code § 21-7-5 (1990) 10, 18
Ariz. Rev. Stat. Ann. § 34-438 (1990) 10
Ariz. Rev. Stat. Ann. § 41-1441 (1990) 18
Ariz. Rev. Stat. Ann. § 41-1492 (2003) 28
Ariz. Rev. Stat. Ann. § 41-1492.09[B] (2003) 27
Ark. Code Ann. § 20-14-302 (1990) 10, 18
Ark. Code Ann. § 20-14-303 (1990) 19, 22, 23
Ark. Code Ann. § 20-14-610 (1990) 10
Cal. Civ. Code § 51 (1990) 10–11, 18, 22
Cal. Gov't Code § 4458 (1990) 10
Cal. Gov't Code § 12926 (1990) 23
Cal. Gov't Code § 12926 (2003) 28
Cal. Gov't Code § 12944 (1990) 22
Colo. Rev. Stat. Ann. § 24-34-306 (1990) 11, 14, 26
Colo. Rev. Stat. Ann. § 24-34-605 (1990) 14, 26
Conn. Gen. Stat. Ann. § 46a-64 (1990) 23
Conn. Gen. Stat. Ann. § 46a-99 (1990) 11, 14, 26
Del. Code Ann. tit. 6, § 4501 (1990) 18, 19, 22, 23
Del. Code Ann. tit. 6, § 4502 (2003) 28
Fla. Stat. Ann. § 393.13 (1990) 20, 22
Fla. Stat. Ann. § 413.08 (1990) 23
Fla. Stat. Ann. § 413.08(1) (1990) 20, 22
Fla. Stat. Ann. § 768.28 (1990) 12
Ga. Code Ann. § 30-3-1 (1990) 19, 22, 23
Ga. Code Ann. § 30-3-5 (1990) 11
Ga. Code Ann. § 30-3-6 (1990) 18

Ga. Code Ann. § 30-4-3 (1990) 11
Haw. Rev. Stat. Ann. § 368-1.5(a) (1990) 25
Haw. Rev. Stat. Ann. § 489-7.5 (1990) 11, 26
Haw. Rev. Stat. Ann. § 489-7.5 (2003) 28
Haw. Rev. Stat. Ann. § 489-7.5(a)(1) (2003) 27
Idaho Code § 39-3201 (1990) 11, 20, 22
Idaho Code § 39-3210 (1990) 18
Idaho Code § 39-4126 (1990) 23
Ind. Code Ann. § 22-9-1-2 (1990) 11
Ind. Code Ann. § 22-9-1-2(a) (1990) 20
Ind. Code Ann. § 22-9-1-3(r) (1990) 23
Ind. Code Ann. § 22-9-8-1 (2003) 11, 27
Ind. Code Ann. § 22-9-8-3 (2003) 27
Ind. Code Ann. § 22-15-2-7 (1990) 11
Iowa Code Ann. § 601A.2 (1990) 23
Kan. Stat. Ann. § 44-1002 (1990) 23
Kan. Stat. Ann. § 44-1002 (2003) 28
Kan. Stat. Ann. § 44-1005 (1990) 14, 26
Kan. Stat. Ann. § 44-1005(k) (1990) 12, 26
Kan. Stat. Ann. § 44-1009(c)(3) (1990) 22
Ky. Rev. Stat. Ann. § 344.010 (2003) 28
Ky. Rev. Stat. Ann. § 344.120 (1990) 18
Ky. Rev. Stat. Ann. § 344.120 (2003) 28
Ky. Rev. Stat. Ann. § 344.130 (2003) 28
La. Rev. Stat. Ann. § 46:2254 (1990) 25
Mass. Gen. Laws Ann. Const. Amend. CXIV (1990) 25
Mass. Gen. Laws ch. 272, § 98 (1990) 23
Md. Ann. Code art. 49B, § 5 (1990) 11, 23
Md. Ann. Code art. 49B, § 7 (1990) 20
Me. Rev. Stat. Ann. tit. 5, § 4551 (1990) 20
Me. Rev. Stat. Ann. tit. 5, § 4553 (1990) 23
Me. Rev. Stat. Ann. tit. 5, § 4553 (2003) 28
Me. Rev. Stat. Ann. tit. 5, § 4592 (2003) 28
Mich. Comp. Laws § 37.1103 (1990) 23
Minn. Stat. Ann. § 363.03(3)(2) (1991) 25

Minn. Stat. Ann. § 363.03(4)(1) (1991) 25
Miss. Code Ann. § 43-6-5 (1990) 20, 22, 23
Miss. Code Ann. § 43-6-11 (1990) 11, 18
Miss. Code Ann. § 43-6-123 (1990) 11
Mo. Rev. Stat. § 213.010 (1990) 23
Mo. Rev. Stat. § 213.010 (2003) 28
Mo. Ann. Stat. § 213.010(8) (1990) 25
Mont. Code Ann. § 49-2-101 (1990) 23
Mont. Code Ann. § 49-2-101 (2003) 28
N.C. Gen. Stat. § 168A-3(10)(b) (1990) 25
N.C. Gen. Stat. § 168A-11(b) (1990) 11, 26
N.D. Cent. Code § 14-02.4-14 (2003) 28
N.D. Cent. Code § 14-02.4-15 (2003) 28
N.D. Cent. Code § 14-02.4-20 (2003) 27
N.D. Cent. Code § 48-02-19 (1991) 11, 20, 22
N.H. Rev. Stat. Ann. § 155:39-b (1990) 18
N.H. Rev. Stat. Ann. § 354-A:2 (2003) 28
N.H. Rev. Stat. Ann. § 354-A:3 (1990) 22, 23
N.H. Rev. Stat. Ann. § 354-A:21 (2003) 27
N.H. Rev. Stat. Ann. § 354-A:22 (2003) 11
N.J. Stat. Ann. § 10:5-5 (1990) 18
N.J. Stat. Ann. § 10:5-13 (1990) 12
N.J. Stat. Ann. § 52:32-4 (1990) 15
N.M. Stat. Ann. § 28-1-2(A) (1990) 17
N.M. Stat. Ann. § 28-1-7(f) (1990) 17
N.Y. Exec. Law § 296(2)(a) (1990) 11, 20
N.Y. Pub. Bldgs. Law § 50(1) (1990) 11
N.Y. Pub. Bldgs. Law § 51 (1990) 11
Neb. Rev. Stat. § 20-127 (1990) 20, 22, 23
Neb. Rev. Stat. § 20-129 (1990) 11, 18
Neb. Rev. Stat. § 72-1108 (1990) 15
Neb. Rev. Stat. § 72-1119 (1990) 11
Neb. Rev. Stat. § 72-1122 (1990) 15
Neb. Rev. Stat. § 72-1124 (1990) 11
Nev. Rev. Stat. Ann. § 41.035 (1991) 12, 26

Nev. Rev. Stat. Ann. § 651.050 (1990) 23
Nev. Rev. Stat. Ann. § 651.050 (2003) 28
Nev. Rev. Stat. Ann. § 651.070 (1991) 22
Nev. Rev. Stat. Ann. § 651.090(1) (1991) 12, 26
Ohio Rev. Code Ann. § 3781.111(A) (2003) 15
Ohio Rev. Code Ann. § 4112.01(A)(9) (2003) 15
Ohio Rev. Code Ann. § 4112.02 (2002) 20
Ohio Rev. Code Ann. § 4112.02(G) (2003) 15
Ohio Rev. Code Ann. § 4112.99 (1990) 12
Ohio Rev. Code Ann. § 4112.99 (2000) 14
Okla. Stat. tit. 25, § 1402 (1990) 11, 26
Pa. Stat. Ann. tit. 43, § 954 (1990) 23
Pa. Stat. Ann. tit. 43, § 954 (2003) 28
Pa. Stat. Ann. tit. 43, § 962(c.2) (2003) 13, 26, 27
R.I. Gen. Laws § 42-87-4 (1990) 13, 26
S.C. Code Ann. § 43-33-520 (1990) 22
S.C. Code Ann. § 43-33-540 (1990) 12, 26
S.C. Code Ann. § 43-33-560 (1990) 22, 23
S.D. Codified Laws § 5-14-14 (1991) 11
S.D. Codified Laws § 20-13-23 (1990) 26
S.D. Codified Laws § 20-13-23.7 (1990) 25
S.D. Codified Laws § 20-13-24 (1991) 26
S.D. Codified Laws § 20-13-35.1 (2003) 11, 27, 28
Tenn. Code Ann. § 4-21-501 (1990) 18
Tenn. Code Ann. § 68-18-202 (1990) 9, 15
Tenn Code Ann. § 68-18-203(2) (1990) 15
Tenn. Code Ann. § 68-120-205 (1990) 9
Tenn. Code Ann. § 68-120-205(b) (1990) 11
Tenn. Pub. Acts 1970, ch. 484, § 2 9
Tex. Hum. Res. Code Ann. § 121.001 (1990) 20
Tex. Hum. Res. Code Ann. § 121.002(4) (1990) 23
Tex. Hum. Res. Code Ann. § 121.004(b) (1990) 13
Utah Code Ann. § 26-29-2 (1990) 22, 23
Utah Code Ann. § 26-29-4 (1990) 11
Utah Code Ann. § 26-30-1 (1990) 20

Utah Code Ann. § 26-30-4 (1990) 11, 18
Va. Code Ann. § 51.5-3 (1990).....23
Va. Code Ann. § 51.5-40 (1990).....25
Va. Code Ann. § 51.5-46(A) (1990) 12, 26
Vt. Stat. Ann. tit. 9, § 4501(1) (2003).....28
Vt. Stat. Ann. tit. 9, § 4502 (1990) 20
Vt. Stat. Ann. tit. 9, § 4502(c) (2003).....28
Wash. Rev. Code Ann. § 49.60.040 (1990) 19
Wash. Rev. Code Ann. § 49.60.215 (1990) 19
Wash. Rev. Code Ann. § 70.84.010 (1990) 23
W. Va. Code Ann. § 5-11-10 (1991).....12, 26
W. Va. Code Ann. § 5-11-13(c) (1991) 12, 26
Wis. Stat. Ann. § 101.13 (1990) 23
Wis. Stat. Ann. § 101.13(2)(d) (1990) 15
Wis. Stat. Ann. § 101.13(4) (1990).....12
Wis. Stat. Ann. § 101.22(1m)(b) (1990).....22
Wis. Stat. Ann. § 101.22(1m)(bp) (1990).....18
Wis. Stat. Ann. § 101.22(9)(a) (1990) 20
Wis. Stat. Ann. § 106.52(c) (2003).....28
Wyo. Stat. Ann. § 16-6-501 (1990) 11
Wyo. Stat. Ann. § 35-13-201 (1990) 20
Wyo. Stat. Ann. § 35-13-201(a) (1990).....23
Wyo. Stat. Ann. § 35-13-203 (1990) 11, 18

REGULATIONS:

28 C.F.R. § 35.130(b)(7) (2003) 25
28 C.F.R. § 35.149 (2003) 6

OTHER AUTHORITIES:

American National Standard for Buildings and Facilities § 4.13.8 (1986) 16
American National Standards Association, *ANSI—An Historical Overview,* http://www.ansi.org/about_ansi/introduction/history.aspx?menuid=1 (visited Nov. 9, 2003).....16

Colker, Ruth, & Adam Milani *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075 (2002) 5, 19, 27
Del. Op. Att'y Gen. No. 00-IB09 (May 30, 2000), 2000 WL 1092966 (Del. A.G.) 18
H.R. Rep. No. 94-1558 (1976).....13
H.R. Rep. No. 101-485, pt. 3 (1990).....13
S. Rep. No. 94-1011 (1976) 13
S. Rep. No. 101-116 (1989) 3, 6, 8
U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities (1983) 8

BRIEF FOR THE TRAINING AND ADVOCACY SUPPORT CENTER OF THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Training and Advocacy Support Center of the National Association of Protection and Advocacy Systems ("TASC/NAPAS") provides training and technical assistance to the nationwide system of protection and advocacy ("P&A") agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands), P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all people with disabilities in a variety of settings. In fiscal year 2002, P&As served over 65,000 persons with disabilities through individual case representation and systemic advocacy.

The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. P&As are particularly active in providing assistance to persons with disabilities under the Americans with Disabilities Act ("ADA").

Because of its national P&A membership and familiarity with the protections afforded by each state to persons with disabilities, TASC/NAPAS has firsthand knowledge of the state laws and how they operate in practice. TASC/NAPAS is thus uniquely suited to assist the Court in understanding the

---

[1] No counsel for any party authored this brief either in whole or in part, and no persons other than the *amicus curiae* and their counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

state law backdrop against which Congress enacted the ADA as well as the status of that backdrop today.

INTRODUCTION AND SUMMARY

Title II of the Americans with Disabilities Act ("ADA") proscribes discrimination in the provision of public "services, programs, or activities." Section 202, 42 U.S.C. § 12132. After an exhaustive investigation, Congress determined that such national legislation was required, expressly finding that persons with disabilities "continually encounter * * * [the] failure to make modifications to existing facilities" such as court houses and polling places, and that discrimination against persons with disabilities persists in "access to public services." Section 2(a)(3), (5), 42 U.S.C. § 12101(a)(3), (5). Congress expressly determined that this discrimination continued in significant measure because persons with disabilities "have often had no legal recourse to redress such discrimination." Section 2(a)(4), 42 U.S.C. § 12101(a)(4). As a result, Congress concluded that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis." Section 2(a)(9), 42 U.S.C. § 12101(a)(9).

In the face of these express statutory findings, petitioner nevertheless suggests in its opening brief that the legislative history of the ADA demonstrates that when it enacted the ADA, Congress believed that state law was generally sufficient to safeguard against the pervasive discrimination against people with disabilities. Pet. Br. at 21–22 ("[F]ar from indicating concerns about state-sponsored misconduct, the legislative record reflects congressional recognition of the States' leadership in safeguarding the rights of the disabled," citing *Bd. of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368 n.5 (2001)).

Petitioner's error in this assertion is three-fold. First, petitioner ignores the clear legislative findings quoted above

specifically referencing the pervasive discrimination in facilities and services, and noting the inadequacy of existing remedies. Such legislative findings, included in the statutory text, must be given greater weight than isolated statements selected from the vast legislative history. See, *e.g.*, *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 90-91 (2000) (noting that an examination of the legislative record is not necessary in all circumstances and striking down the ADEA in part because there were no statutory findings regarding state action).

Second, the weight of legislative history is in line with the statutory findings and contrary to petitioner's position. For example, the Fifty State Governors' Committees, on whose reports Congress relied, concluded that "existing State laws do not adequately counter such acts of discrimination." S. Rep. No. 101-116, at 18 (1989). And petitioner's suggestion regarding the adequacy of state law conflicts sharply with the conclusion of the Senate Report that "State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing." *Id.*

Third, consistent with the legislative findings noted above, an examination of state laws in existence at the time the ADA was passed shows that they provided inconsistent and inadequate remedies and coverage, seriously limiting the ability of many persons with disabilities to gain redress for egregious discrimination by the states. Indeed, much of the "unfair and unnecessary discrimination and prejudice" that Congress observed can be traced directly to the states' failure to guarantee persons with disabilities access to state facilities and services.

We demonstrate that when the ADA was enacted, only one state had explicit statutory protection comparable to Title II of the ADA in the areas we discuss below. Thus, contrary to the suggestions of petitioner, Title II was not unnecessary legislation enacted over a landscape of protective state law. Rather, like the Family and Medical Leave Act of 1993

("FMLA") recently upheld in *Nevada Department of Human Resources* v. *Hibbs*, 123 S. Ct. 1972 (2003), Title II was enacted to respond to the inadequate protection provided by an incomplete and porous patchwork of state laws. 123 S. Ct. at 1980–81 (holding that Congress was justified in enacting the FMLA as remedial legislation, relying in part on the fact that the Court had identified fourteen states whose family leave policies had "important shortcomings").[2]

Title II ensures that persons with disabilities have consistent protection against discrimination in access to state facilities and services, regardless of the state in which they reside. See Section 202, 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."). Although we address state facilities and state services separately in this brief, the two go hand-in-hand because without accessible facilities most of a state's services will be inaccessible to persons with disabilities. See, *e.g.*, *Barden* v. *City of Sacramento*, 292 F.3d 1073, 1075 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2639 (2003) ("One form of prohibited discrimination [under Title II] is the exclusion from a public entity's services, programs, or activities because of the inaccessibility of the entity's facility."). Similarly, a state facility that complies with Title II does not provide

[2] The Brief of *Amici Curiae* Alabama, Nebraska, Nevada, North Dakota, Oklahoma, Utah, and Wyoming in Support of Petitioner asserts (at 24) that "*existing* State laws are sufficient to address the vast majority of accessibility problems" (emphasis added) and includes an appendix of current state statutes. Following *Hibbs*, we focus initially on the status of state law when Congress passed the ADA. See 123 S. Ct. at 1980–81 (evaluating shortcomings in states' leave polices in existence at the time the FMLA was enacted). Nevertheless, in Part IV, we demonstrate that the State *Amici* supporting petitioner are wrong because current state laws do not in fact provide adequate accessibility for persons with disabilities.

meaningful access if state services within the facility are denied to persons with disabilities.

In Part I below we briefly describe the coverage of the ADA with respect to state facilities and services. We also explain why the ADA's remedial scheme is essential to this coverage. In Part II we demonstrate that in 1990, when the ADA was passed, thirty-four states had statutes that did not ensure access to state facilities in a manner equivalent to Title II. Then, in Part III, we shift our focus to state services and demonstrate that all but one of the states failed to provide access to state services in a manner equivalent to Title II.

Finally, we demonstrate in Part IV that state law remains inadequate today. Absent Title II, enforcement of the rights of people with disabilities to access state facilities and services would be greatly diminished. Thus, not only was Congress acting to remedy significant gaps in state anti-discrimination laws when it enacted the ADA, but the continuing vitality of Title II of the ADA is essential to secure the guarantee of equal protection and due process for all persons with disabilities.[3]

ARGUMENT

I. The ADA Provides Protection With Respect to Both State Facilities and State Services

The ADA's coverage of state facilities and services has two main components: a general prohibition of discrimination in

[3] In this brief, we rely heavily on the work of Professors Ruth Colker and Adam Milani in a recent article in the Alabama Law Review. Ruth Colker and Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075 (2002). This article surveys current state law in detail and concludes that absent the protections of Title II of the ADA, the protection available to persons with disabilities would be greatly diminished in a majority of states. In an appendix to the article, the authors attach a comprehensive state-by-state summary of state disability law as it relates to Title II of the ADA.

access to state facilities and services and a remedial scheme that deters such discrimination and provides appropriate relief when such discrimination occurs. Section 202, which prohibits discrimination in services, programs, and activities provides that:

> "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Public facilities such as public buildings, sidewalks, and recreational facilities are covered in two ways. First, without access to public buildings, sidewalks, and recreational facilities, persons with disabilities are systematically denied the "services, programs, [and] activities" provided by the state. Second, the existing regulations from Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, expressly covered such facilities, and thus Congress ensured that Title II covered such facilities by specifically directing the Attorney General to adopt regulations "consistent with" the Rehabilitation Act regulations to cover "facilities." See Sections 204(b) and (c), 42 U.S.C. §§ 12134(b) & (c).[4]

Moreover, Congress recognized that without an effective remedial scheme such prohibitions would have little impact on the pervasive discrimination existing at the time and that the "inclusion of penalties and damages i[s] the driving force that facilitates voluntary compliance." S. Rep. No. 101-116, at 15 (1989). Title II therefore incorporates by reference the

[4] The Attorney General promulgated such regulations. See 28 C.F.R. § 35.149 (2003) ("[N]o qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity.")

enforcement provisions under Section 505 of the Rehabilitation Act, 29 U.S.C. § 794a (which themselves are based on the remedies applicable to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*). See Section 203, 42 U.S.C. § 12133. Under this remedial scheme plaintiffs may obtain injunctive relief and damages. The ADA also allows a successful plaintiff to receive "a reasonable attorney's fee, including litigation expenses, and costs." Section, 505, 42 U.S.C. § 12205. This set of remedies gives states a strong incentive to provide access to facilities and services and provides adequate redress for a person who encounters discrimination by the state.

Since 1990, persons with disabilities have relied on Title II to challenge numerous discriminatory acts involving core governmental functions. Respondents are among the many persons with disabilities who have used Title II to challenge a state's unwillingness to make its courts accessible to persons with disabilities. Title II has also been used to challenge discriminatory acts involving voting,[5] institutionalization,[6] education,[7] prisoners' rights,[8] law enforcement,[9] and public

[5] See, *e.g.*, *New York ex rel. Spitzer* v. *County of Schoharie*, 82 F. Supp. 2d 19 (N.D.N.Y. 2000) (failure to ensure that polling places were accessible to people with disabilities violated Title II); *Doe* v. *Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001) (overbroad exclusion of individuals with mental illness from voting violated Title II).

[6] See, *e.g.*, *Olmstead* v. *L.C., ex rel. Zimring*, 527 U.S. 581 (1999) (unjustified institutional isolation of persons with disabilities violates Title II).

[7] See, *e.g.*, *Wong* v. *Regents of the Univ. of Cal.*, 192 F.3d 807 (9th Cir. 1999) (student with disability sued to require university to make reasonable modification).

[8] See, *e.g.*, *Pa. Dep't of Corr.* v. *Yeskey*, 524 U.S. 206 (1998) (Title II applies to state correctional facilities).

[9] See, *e.g.*, *Barnes* v. *Gorman*, 536 U.S. 181 (2002) (plaintiff sued police department for injuries sustained while being transported in a van not equipped to hold a wheelchair).

assistance programs.[10] By ensuring that individuals with disabilities have access to such basic facilities and services, Title II of the ADA has enabled them to participate as equal citizens in the most fundamental aspects of our society. Before the ADA was enacted, many state laws failed to adequately address the exclusion of people with disabilities from government facilities and services and their resulting isolation from public life and inability to participate fully in the rights and privileges of citizenship. Had Congress not enacted Title II, many people with disabilities would have remained second-class citizens, unable to have their day in court, attend school or state universities, cast a ballot, or receive public assistance benefits.

II. When the ADA Was Enacted, Individual State Laws Failed To Ensure Persons with Disabilities Access to State Facilities.

A. Remedies With Respect to State Facilities

In prohibiting discrimination in access to state facilities Congress recognized that "the rights guaranteed by the ADA are meaningless without effective enforcement provisions" and that "the inclusion of penalties and damages i[s] the driving force that facilitates voluntary compliance." S. Rep. No. 101-116, at 15 (1989). Congress was also aware of a report by the U.S. Commission on Civil Rights that found that seventy-six percent of state buildings were not accessible to persons with disabilities even though many states had statutes requiring that such buildings be accessible. See U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 39 (1983). Thus, as discussed above, Congress guaranteed the enforcement of Title II's

[10] See, *e.g.*, *Lovell* v. *Chandler*, 303 F.3d 1039 (9th Cir. 2002), cert. denied, 537 U.S. 1105 (2003) (exclusion of persons with disabilities from state health insurance program violated Title II).

prohibitions by allowing those with the greatest incentive to enforce its prohibitions—persons with disabilities—to recover damages and attorney's fees when states failed to comply with Title II. See Sections 203 and 505, 42 U.S.C. §§ 12133 & 12205.

As reflected in the Senate report cited above, at the time Congress enacted the ADA most states failed to provide equivalent relief for discrimination in access to state facilities thus depriving their accessibility "requirements" of any real meaning. For example, in 1990 petitioner had a policy requiring accessibility in all "public buildings" that had been in effect since 1970. See Tenn. Code Ann. § 68-18-202 (1990) (historical notes indicate statute was enacted in 1970 Pub. Acts, ch. 484, § 2).[11] But no fine or penalty was available for state violations of this provision. See *id.* § 68-120-205 (1990). Thus, Tennessee and other states that did not provide meaningful enforcement mechanisms had no incentive to comply with their own accessibility statutes and failed to provide relief to individuals who suffered discrimination.

1. Private Right of Action for Damages

The private right of action for damages provided by Title II serves several important purposes. First, the threat of damages provides states with a strong incentive not to discriminate in providing access to its facilities. See *Owen* v. *City of Independence*, 445 U.S. 622, 651–52 (1980) (noting the deterrent effect of damage remedies on governmental conduct). Second, a person with a disability who suffers discrimination at the hands of the state should be able to

[11] In this brief, all citations to state statutes are taken from the online databases on either Westlaw or Lexis. The citations to historical statutes were taken from the databases on those services for the year identified. Citations to current law are taken from the current statute databases and identified as 2003.

receive damages for any compensable harm that is attributable to the discrimination. *Bivens* v. *Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). Finally, a damage remedy is a particularly important remedy for discrimination in access to state facilities because when an individual is denied access to a state facility to which he may never return, such as a courthouse, he may lack standing to seek injunctive relief under this Court's precedents. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Thus, for some persons with disabilities, it may be that "damages is the only possible remedy." *Bivens*, 403 U.S. at 409.

A survey of state accessibility statutes in 1990 reveals that thirty-one states either did not clearly allow a person who was illegally denied access to a facility to sue for damages or significantly restricted such relief. First, nineteen states did not clearly allow a private right of action for facilities discrimination. For example, Alabama's statute had two provisions requiring state facilities to be accessible. See Ala. Code §§ 21-4-4, 21-7-2 (1990). Section 21-4-4 was enforced by the state fire marshal who could order compliance, see Section 21-4-7, while Section 21-7-2 could only be enforced by a misdemeanor penalty, see Section 21-7-5. Because a state prosecutor cannot bring a criminal action against the state, the misdemeanor penalty does not even apply to state discrimination. Thus, Alabama provided no private right of action against the state for discriminating in providing access to the state's facilities.[12]

[12] See also Ariz. Rev. Stat. Ann. § 34-438 (1990) (state has enforcement authority); Ark. Code Ann. § 20-14-302 (1990) (only penalty a misdemeanor) and *id.* § 20-14-610 (1990) (state has enforcement authority); Cal. Gov't Code § 4458 (1990) (government can "bring an action to enjoin a violation") and *Black* v. *Dep't of Mental Health*, 100 Cal. Rptr. 2d 39 (Ct. App. 2000) (affirming lower court's finding that state is not a "business establishment[ ]" covered by Cal. Civ. Code § 51

Second, in three additional states an individual could bring a private right of action, but could not recover damages (even for intentional discrimination).[13] Six other states failed to

(1990); Ga. Code Ann. § 30-3-5 (1990) (state has enforcement authority) and *id.* § 30-4-3 (1990) (only penalty a misdemeanor); Haw. Rev. Stat. Ann. § 489-7.5 (1990) (provision allowing private right of action not effective until 1991); Idaho Code § 39-3201 (1990) (state has enforcement authority); Ind. Code Ann. §§ 22-9-8-1, -3 (2003) (see historical notes) (provisions allowing private right of action under Ind. Code Ann. § 22 9-1-2 (1990) not effective until 1994) and *id.* § 22-15-2-7 (1990) (state has enforcement authority); Md. Ann. Code art. 49B, § 5 (1990), and *Johnson* v. *Tufton Group, Inc.*, No. CIV. L-99-144, 2001 WL 210046, at *4 (D. Md. Feb 28, 2001) (only state agency may enforce art. 49B, § 5); Miss. Code Ann. § 43-6-11 (1990) (misdemeanor is only penalty specified) and *id.* § 43-6-123 (1990) (state given limited enforcement authority); N.D. Cent. Code § 48-02-19 (1991) (see historical notes in 1991 database) (no enforcement mechanism for violations); N.H. Rev. Stat. Ann. § 354-A:22 (2003) (see historical notes in 2003 database) (provision allowing private right of action effective in 1992); N.Y. Pub. Bldgs. Law § 50(1), 51 (1990) (no private right of action specified) and N.Y. Exec. Law § 296(2)(a) (1990) (does not clearly apply to the state); Neb. Rev. Stat. Ann. § 20-129 (1990) (misdemeanor is only penalty specified) and *id.* §§ 72-1119, 72-1124 (1990) (state given limited enforcement authority but misdemeanor only penalty specified); Okla. Stat. tit. 25 § 1402 (1990) (no private right of action specified); S.D. Codified Laws § 20-13-35.1 (2003) (see historical notes in 2003 database) (provision allowing private right of action added in 1991) and *id.* § 5-14-14 (1990) (state enforces building code); Tenn. Code Ann. § 68-120-205(b) (1990) (no penalty may be assessed against the state); Utah Code Ann. § 26-29-4 (1990) (state has limited enforcement authority) and *id.* 26-30-4 (1990) (misdemeanor is only penalty specified); Wyo. Stat. Ann. § 35-13-203 (1990) (misdemeanor is only penalty specified) and *id.* § 16-6-501 (1990) (state given limited enforcement authority).

[13] See Colo. Rev. Stat. Ann. § 24-34-306 (1990) (allowing private right of action) and *City of Colo. Springs* v. *Conners*, 993 P.2d 1167, 1171 (Colo. 2000) (holding that Colorado Governmental Immunity Act bars compensatory damages against the state but permits equitable relief for civil rights violations allowed); Conn. Gen. Stat. Ann. § 46a-99 (1990) (injunctive relief only); N.C. Gen. Stat. § 168A-11(b) (1990) (allows declaratory and injunctive relief but not damages).

provide adequate relief because the states had significant limits on the amount of damages that an individual could recover. In South Carolina, for example, a successful plaintiff's recovery of actual damages was limited to $5,000. See S.C. Code Ann. § 43-33-540 (1990).[14] Finally, three states allowed a private right of action for damages against the state but this remedy was not clearly available for discrimination involving all state facilities.[15]

2. Attorney's Fees

Attorney's fees, like damages, play a critical role in the enforcement of facilities accessibility requirements. The enforcement of accessibility requirements, like other civil rights laws, is dependent to a large degree on causes of action filed by plaintiffs acting as "private attorney[s] general." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402

[14] See also Fla. Stat. Ann. § 768.28 (1990) (relief against state capped at $100,000); Kan. Stat. Ann. § 44-1005(k) (1990) ($2,000 limit on damages for pain, suffering and humiliation); Nev. Rev. Stat. Ann. § 651.090(1) (1991) (see historical notes in 1991 database) (Section 41.035 (1991) imposes a $50,000 limit on tort damages against state and state employees); Va. Code Ann. § 51.5-46(A) (1990) (allows compensatory damages but prohibits damages for pain and suffering); W. Va. Code Ann. §§ 5-11-13(c), 5-11-10 (1991) (see historical notes in 1991 database) (while compensatory damages are available in court, a complainant in an administrative proceeding could only receive incidental compensatory damages, the modern equivalent of $1,000 in 1977).

[15] See N.J. Stat. Ann. § 10:5-13 (1990) (allowing private right of action for violations of public accommodation statute) and *Doe* v. *Div. of Youth & Family Servs.*, 148 F. Supp. 2d 462, 496 (D.N.J. 2001) (holding that public accommodation statute coverage is limited to the few state facilities listed in the statute); Ohio Rev. Code Ann. § 4112.99 (1990) (private right of action not clearly applicable to facilities other than "public buildings"); Wis. Stat. Ann. § 101.13(4) (1990) (private right of action not clearly applicable to facilities other than "public buildings" and recovery limited to costs, disbursements and attorney's fees).

(1968).[16] Without attorney's fees, however, an individual who has suffered discrimination may not be able to find an attorney willing to file an action on his or her behalf. See, *e.g.*, H.R. Rep. No. 94-1558, at 1 (1976) ("Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts * * *."). Furthermore, the threat of paying a successful plaintiff's attorney's fees, like the threat of paying damages, gives states an incentive to comply with a prohibition.

Nevertheless, seven of the states that allowed some private right of action against the state did not provide attorney's fees for a successful plaintiff.[17] Three states that covered facilities and allowed a full private right of action against the state for damages did not have an attorney's fees provision.[18] Four other states that allowed only a limited private right of action

[16] See generally S. Rep. No. 94-1011, at 2–6 (1976), part of the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, which added what is now Rev. Stat. § 722(b), 42 U.S.C. § 1988(b). The attorney's fee provision of the ADA, Section 505, 42 U.S.C. § 12205, was based on the Civil Rights Attorney's Fees Awards Act. H.R. Rep. No. 101-485, pt. 3, at 73 (1990). Thus, the discussion of attorney's fees in the legislative history of the 1976 statute is relevant to the ADA provision as well.

[17] A person with a disability is generally guaranteed attorney's fees only if the state had an explicit attorney's fees provision applicable to state discrimination in providing access to facilities. See, *e.g.*, *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 269 (1975) (generally courts may not award attorney's fees absent a legislative instruction to do so); *Sutherland* v. *Nationwide Gen. Ins. Co.*, 657 N.E.2d 282–83 (Ohio Ct. App. 1995) (refusing to award attorney's fees to a plaintiff who sued under an Ohio anti-discrimination law allowing "other appropriate relief" because statute did not explicitly authorize recovery of attorney's fees).

[18] See Pennsylvania (section in current law allowing attorney's fees, see Pa. Stat. Ann. tit. 43, § 962(c.2) (2003), effective in 1991); R.I. Gen. Laws § 42-87-4 (1990) (relief provision does not include attorney's fees); Tex. Hum. Res. Code Ann. § 121.004(b) (1990) (same).

against the state for facilities violations did not allow attorney's fees.[19]

B. Coverage of State Facilities

In addition to addressing states' failure to provide adequate remedies for discrimination in the provision of access to facilities, Title II addressed important shortcomings in the scope of some states' facilities coverage. Title II prohibits states from discriminating in access to all state facilities, including public buildings, such as court houses and schools, as well as public sidewalks, streets, and recreational facilities. Accessible sidewalks and streets are particularly important rights guaranteed by Title II because, without them, a person with a disability might never get to an accessible building and the accessible services therein:

> "Without curb cuts, people with ambulatory disabilities simply cannot navigate the city; activities that are commonplace to those who are fully ambulatory become frustrating and dangerous endeavors. At present, people using wheelchairs must often make the Hobson's choice between traveling in the streets—with cars and buses and trucks and bicycles—and traveling over uncut curbs which, even when possible, may result in the wheelchair becoming stuck or overturning, with injury to both passenger and chair." *Kinney* v. *Yerusalim*, 9 F.3d 1067, 1069 (3d Cir. 1993).

[19] See Colo. Rev. Stat. Ann. §§ 24-34-605, 24-34-306 (1990) (relief does not include attorney's fees); Conn. Gen. Stat. Ann. § 46a-99 (1990) (relief provision does not include attorney's fees); Kan. Stat. Ann. § 44-1005 (1990) (same); Ohio Rev. Code Ann. § 4112.99 (2003) (historical text unavailable) (allowing damages and "other appropriate relief" for some facilities violations) and *Sutherland* v. *Nationwide Gen. Ins. Co.*, 657 N.E.2d 281, 283 (Ohio Ct. App. 1995) (finding that Ohio Rev. Code Ann. § 4112.99 does not authorize attorney's fees).

At the time Congress passed the ADA, four states did not have statutes that clearly applied to state facilities other than buildings. For example, as noted above, petitioner had a policy requiring accessibility in all "public buildings." Tenn. Code Ann. § 68-18-202 (1990). The state's definition of "public buildings" however, did not include other facilities such as streets, sidewalks, and recreational facilities. Tenn. Code Ann. § 68-18-203(2) (1990). Three other states had statutes that, like Tennessee's, covered public buildings but failed to clearly cover such other facilities.[20]

Furthermore, some state statutes which covered state facilities did not provide sufficient accessibility guidelines or require an agency to promulgate accessibility regulations. For example, Nebraska's statute contained some specific requirements for facilities accessibility and provided that the "Public Buildings Safety Advisory Committee *may* promulgate and implement codes pursuant to sections 72-1101 to 72-1119 consistent with the uniform building codes and standards set by the American Standards Association, Inc." Neb. Rev. Stat. § 72-1122 (1990) (emphasis added). Thus it was left to the Public Buildings Safety Advisory Committee to decide whether to adopt detailed guidelines to facilitate compliance with vague requirements such as those provided for door thresholds. *Id.* § 72-1108 ("[A]s much as practicable" door thresholds "shall be flush with the

[20] See N.J. Stat. Ann. § 52:32-4 (1990) (public buildings required to "provide facilities for the physically handicapped") and *Doe* v. *Div. of Youth & Family Servs.*, 148 F. Supp. 2d 462, 496 (D.N.J. 2001) (holding that some state facilities are not covered by public accommodation statute); Ohio Rev. Code Ann. § 3781.111(A) (2003) (historical text unavailable) (covers public buildings but not facilities), and *id.* §§ 4112.02(G), 4112.01(A)(9) (2003) (historical text unavailable) (discrimination in public accommodations prohibited, but definition of public accommodation does not explicitly include the state); Wis. Stat. Ann. § 101.13(2)(d) (1990) (covers public buildings but not facilities).

floor.").[21] As recognized in *Hibbs*, 123 S. Ct at 1981, Congress could "reasonably conclude" that statutes such as Nebraska's "offered significantly less firm protection" than Title II which mandated compliance with the Attorney General's detailed accessibility regulations that were to be based on the regulations already promulgated under Section 504 of the Rehabilitation Act.

* * * *

In sum, thirty-four states had facilities accessibility provisions with at least one significant shortcoming in the remedial scheme or coverage of facilities. These shortcomings standing alone provided Congress with sufficient justification for passing Title II. See *Hibbs*, 123 S. Ct. at 1980-81 (relying on shortcomings in only fourteen states). But Congress was also concerned with the lack of accessibility in state services and, as demonstrated below, states failed to provide adequate protection in this area as well.

[21] The American Standards Association, which published standards referenced in Nebraska's statute, changed its name to American National Standards Institute ("ANSI") in 1969. See American National Standards Association, *ANSI—An Historical Overview*, http://www.ansi.org/about_ansi/introduction/history.aspx?menuid=1 (visited Nov. 9, 2003). The ANSI standard for door thresholds provided: "Thresholds at doorways shall not exceed ¾ inch (19 mm) in height for exterior residential sliding doors or ½ in (13 mm) for other types of doors. Raised thresholds and floor level changes at accessible doorways shall be beveled with a slope no greater than 1:2 (see 4.5.2)." American National Standard for Buildings and Facilities § 4.13.8 (1986).

III. When the ADA Was Enacted, Individual State Laws Failed To Protect Persons with Disabilities Against Discrimination in the Provision of State Services.

As demonstrated in Part II above, states failed to provide adequate protection from discrimination in access to state facilities in 1990. In Part III we demonstrate that in 1990 states provided even less protection with respect to state services. Many state laws failed to cover state services at all, and many that did had substantial shortcomings in that coverage. And, as with state facilities, the remedies provided under state law fell well short of those provided under the ADA.

A. Coverage of State Services

When the ADA was enacted, only twenty-four states provided statutory protection against disability discrimination in the provision of public services and programs. In the states which did offer such protection, the statutes often took the form of "public accommodation" laws that could be interpreted to cover state services as well as facilities.[22] For example, New Mexico had a statute forbidding any person, specifically including the state, "in any public accommodation" from discriminating in "offering or refusing to offer its *services*, facilities, accommodations or goods to any individual because of * * * physical or mental handicap." N.M. Stat. Ann. §§ 28-1-7(f) and 28-1-2(A) (1990) (emphasis added). Thus, we assume that a claimant could sue the state if it were discriminating against that individual with respect state services (or programs or activities) because of his or her disability.

[22] The discussion of accessibility requirements for state facilities in Part II included public accommodation statutes, which can apply to both facilities and services, as well as statutes applicable only to buildings and facilities.

Twenty-six of the states, however, had no such statutory protection. First, similar statutes in three states—Arizona, Kentucky, and Tennessee—did not cover persons with disabilities at all.[23] In these states, the statutes prohibited discrimination on the basis of sex, national origin and the like but left persons with disabilities without protection.

Second, in thirteen states, the general public accommodation statute either did not cover or was not enforceable against the state. For example, in Mississippi, the only penalty for a violation of the statute was a misdemeanor which would not be enforceable against the state. See Miss. Code Ann. § 43-6-11 (1990).[24] In other states, the types of public accommodations covered by the statute did not expressly include state-run accommodations and services. See, *e.g.*, Cal. Civ. Code § 51 (1990) (prohibiting discrimination on the basis of physical disability by "business establishments") and *Black* v. *Dep't of Mental Health*, 100 Cal. Rptr. 2d 39, 42 n.4 (Ct. App. 2000) (declining to address the lower court's ruling that the state was not covered by the act).[25]

---

[23] See Ariz. Rev. Stat. § 41-1441 (1990); Ky. Rev. Stat. Ann. § 344.120 (1990); Tenn. Code Ann. § 4-21-501 (1990).

[24] See also Ala. Code § 21-7-5 (1990) (only penalty a misdemeanor); Ark. Code Ann. § 20-14-302 (1990) (same); Ga. Code Ann. § 30-3-6, (1990) (same); Idaho Code § 39-3210 (1990) (same); Neb. Rev. Stat. § 20-129 (1990) (same); Utah Code Ann. § 26-30-4 (1990) (same); Wyo. Stat. Ann. § 35-13-203 (1990) (same).

[25] See also Del. Code Ann. tit. 6, § 4501 (1990) and Del. Op. Att'y Gen. No. 00-IB09 (May 30, 2000), 2000 WL 1092966 (Del. A.G.) (state is not covered by statute); N.H. Rev. Stat. Ann. § 155:39-b (1990) (providing a narrow definition of "public accommodation" that does not expressly include the state); N.J. Stat. Ann. § 10:5-5 (1990) (definition of "public accommodation" does not include state under *Doe* v. *Division of Youth & Family Services*, 148 F. Supp. 2d 462, 496 (D.N.J. 2001)); Wis. Stat. Ann. § 101.22(1m)(bp) (1990) (providing definition of public accommodation that does not expressly include the state).

Finally, twenty states had statutes prohibiting disability discrimination with respect to general public accommodations, but unlike New Mexico, these statutes did not clearly cover "services." For example, Washington had a statute prohibiting any person from committing an act which "results in any distinction, restriction, or discrimination * * * in any place of public resort, accommodation, assemblage, or amusement" regardless of disability. Wash. Rev. Code Ann. § 49.60.215 (1990). As in New Mexico, the term "person" was defined to include the state. See Wash. Rev. Code Ann. § 49.60.040 (1990). But the statute did not prohibit such discrimination in the provision of services or programs or activities. To the contrary, in *Fell* v. *Spokane Transit Authority*, 911 P.2d 1319, 1329 (Wash. 1996), the Supreme Court of Washington held that the statute could not be interpreted to cover transportation services offered by the city. The Court held that:

> "What must be very clear * * * is that the [state] statutory mandate to provide access to places of public accommodation is not a mandate to provide services. While entitlement to services may be in the ADA, the Legislature has not enacted a counterpart to the ADA in Washington creating such entitlements." *Id.*[26]

Thus, in Washington, state buildings that accommodate the public may be covered by the statute, but none of the services provided by the state would be.

Of the twenty states that failed to cover discrimination in the provision of services, ten also failed to cover the state (and hence have already been counted in the thirteen states listed above).[27] Ten additional states, including Washington,

---

[26] See Colker and Milani, 53 Ala. L. Rev. at 1093–94, for discussion of case and similar case in Ohio.

[27] See Ala. Code § 21-7-3 (1990); Ark. Code Ann. § 20-14-303 (1990); Del. Code Ann. tit. 6, § 4501 (1990); Ga. Code Ann. § 30-3-1 (1990);

had statutes that did cover the state, at least with respect to its buildings, but failed to cover services.[28]

Adding up the three states that had statutes that did not cover disability discrimination, the thirteen states that had statutes that did not cover the state, and the ten additional states that did cover the state but did not cover services, there were twenty-six states that failed to provide statutory protection against disability discrimination with respect to state services.

B. Limitations in Coverage of State Services

Having established that only twenty-four states had any form of statutory protection against disability discrimination in the provision of state services, we now turn to the various limitations in that protection as compared to what Congress deemed necessary in Title II of the ADA. As we demonstrate below, many of the statutes failed to cover critical populations of persons with disabilities. They also by and large failed to require that states make reasonable modifications in such services to ensure that persons with disabilities would not be denied the benefits of public services. Finally, we show that in many of the states, as with facilities, the remedies with respect to discrimination in

---

Idaho Code § 39-3201 (1990); Miss. Code Ann. § 43-6-5 (1990); Neb. Rev. Stat. § 20-127 (1990); Utah Code Ann. § 26-30-1 (1990); Wis. Stat. Ann. § 101.22(9)(a) (1990); Wyo. Stat. Ann. § 35-13-201 (1990).

[28] Fla. Stat. Ann. § 413.08(1) (1990) (public accommodations statute does not cover services), but see Fla. Stat. Ann. § 393.13 (1990) (covering services discrimination with respect to narrowly defined population of "developmentally disabled"); Ind. Code Ann. § 22-9-1-2(a) (1990); Md. Ann. Code art. 49B, § 7 (1990); Me. Rev. Stat. Ann. tit. 5, § 4551 (1990); N.Y. Exec. Law § 296(2)(a) (1990); Ohio Rev. Code Ann. § 4112.02 (2002) (historical text unavailable), see also *Davis* v. *Flexman*, 109 F. Supp. 2d 776 (S.D. Ohio 1999) (holding that statute does not apply to services); N.D. Cent. Code § 48-02-19 (1991) (see historical notes in 1991 database); Tex. Hum. Res. Code Ann. § 121.001 (1990); Vt. Stat. Ann. tit. 9, § 4502 (1990).

public services were inadequate to address the problem of discrimination effectively.

1. Definition of Persons with Disabilities

A critical step in prohibiting discrimination on the basis of disability is to define the protected class with sufficient breadth. Persons with both physical and mental impairments have long suffered discrimination in this country. So too have persons who have a record of impairment or who are regarded as having such an impairment.

Congress recognized that all such persons need protection against discrimination when it enacted the Rehabilitation Act of 1973 and the 1978 amendments thereto. See 29 U.S.C. § 794 and historical notes. Moreover, by 1990, this Court had similarly recognized the importance of these elements. In *City of Cleburne*, this Court noted that persons with mental disabilities are often the subject of discrimination on the basis of "negative attitudes and fear." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (holding that the city council's denial of a special use permit under a zoning ordinance that prevented a home for persons with mental impairments was unconstitutionally discriminatory under the Fourteenth Amendment).

It is also clear that invidious discrimination can be aimed at persons who, though not currently disabled, have a record of disability or are regarded as having such a disability. Indeed, in *School Board* v. *Arline*, 480 U.S. 273, 284 (1987), this Court recognized that by including both having a "record of" disability and being "regarded as" having a disability in the definition of disability in the Rehabilitation Act, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."

In light of this history, it is not surprising that Congress incorporated these elements into the definition of "disability"

in the ADA. Thus, Section 3(2) of the ADA defines "disability" to mean:

> "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> "(B) a record of such an impairment; or
>
> "(C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

Looking at the landscape of state law in 1990, however, several states failed to incorporate these critical categories. For example, Nevada and Kansas each had statutes that prohibited discrimination in the provision of services, but their coverage of persons with disabilities was limited to those with "physical and visual" impairments (Nev. Rev. Stat. Ann. § 651.070 (1991) (see historical notes in 1991 database) or those with a "physical handicap" (Kan. Stat. Ann. § 44-1009(c)(3) (1990)). Similarly, South Carolina prohibited discrimination against persons because of "handicap" but specifically excluded persons with "mental illness." See S.C. Code Ann. §§ 43-33-520, 43-33-560 (1990).[29]

[29] The exclusion of persons with mental impairments was also pervasive in states which did not cover discrimination in the provision of state services as listed in Part A above. See Ala. Code § 21-7-3 (1990); Ark. Code Ann. § 20-14-303 (1990); Cal. Civ. Code § 51 (1990) (only covering physical disability) and Cal. Gov't Code § 12944 (1990) (specifically relating to licensing boards but only covering "medical conditions or physical handicap" and not "mental handicap"); Del. Code Ann. tit. 6, § 4501 (1990); Fla. Stat. Ann. § 413.08(1) (1990) and Fla. Stat. Ann. § 393.13 (1990) (covering narrowly defined population of "developmentally disabled"); Ga. Code Ann. § 30-3-1 (1990); Idaho Code § 39-3201 (1990); Miss. Code Ann. § 43-6-5 (1990); Neb. Rev. Stat. § 20-127 (1990); N.D. Cent. Code § 48-02-19 (1991) (see historical notes in 1991 database); N.H. Rev. Stat. Ann. § 354-A:3 (1990) (excluding mental illness from the definition of "physical or mental disability"); Utah Code Ann. § 26-29-2 (1990); Wis. Stat. Ann. § 101.22(1m)(b) (1990) (covers narrowly defined population of developmentally disabled); Wyo. Stat. Ann. § 35-13-201(a) (1990).

In addition, eleven of the states that prohibited disability discrimination in the provision of public services failed to include in the protected class persons who are "regarded as" having an impairment and persons who have a "record of" an impairment.[30] Desiring to put an end to discrimination based on such "accumulated myths and fears," Congress drafted the ADA to include protection for both groups. See Section 3(2), 42 U.S.C. § 12102(2).

2. Reasonable Modification

Another significant problem with many state statutes was their failure to require that the states make even simple

[30] See Conn. Gen. Stat. Ann. § 46a-64 (1990); Iowa Code Ann. § 601A.2 (1990); Kan. Stat. Ann. § 44-1002 (1990); Mass. Gen. Laws ch. 272, § 98 (1990); Mich. Comp. Laws § 37.1103 (1990); Mo. Rev. Stat. § 213.010 (1990) (definitions do not include "record of"); Mont. Code Ann. § 49-2-101 (1990) (according to 1991 statute annotation, until 1991 amendment neither group included in definitions); Nev. Rev. Stat. Ann. § 651.050 (1990) (according to 1989 Westlaw database and annotations to current statute, neither group was included in this statute or any others relating to persons with disabilities); Pa. Stat. Ann. tit. 43, § 954 (1990) (neither group included until this statute was amended in 1991); S.C. Code Ann. § 43-33-560 (1990); Va. Code Ann. § 51.5-3 (1990) (definitions do not include "regarded as").

Another eighteen states that did not have protection with respect to the state services also failed to include these elements in their definition of disabled with respect to discrimination in public accommodations. See Ala. Code § 21-7-3 (1990); Ark. Code Ann. § 20-14-303 (1990); Cal. Gov't Code § 12926 (1990); Del. Code Ann. tit. 6, § 4501 (1990); Fla. Stat. Ann. § 413.08 (1990); Ga. Code Ann. § 30-3-1 (1990); Idaho Code § 39-4126 (1990); Ind. Code Ann. § 22-9-1-3(r) (1990); Md. Ann. Code art. 49B, § 5 (1990); Me. Rev. Stat. Ann. tit. 5, § 4553 (1990); Miss. Code Ann. § 43-6-5 (1990); Neb. Rev. Stat. § 20-127 (1990); N.H. Rev. Stat. Ann. § 354-A:3 (1990); Tex. Hum. Res. Code Ann. § 121.002(4) (1990); Utah Code Ann. § 26-29-2 (1990); Wash. Rev. Code Ann. § 70.84.010 (1990); Wis. Stat. Ann. § 101.13 (1990); Wyo. Stat. Ann. § 35-13-201(a) (1990).

modifications to their services and programs to avoid excluding persons with disabilities from participating in or enjoying the benefits of such services and programs. In passing the ADA, Congress recognized that such a requirement was essential to ensure that discrimination could not persist under false rationales. See, *e.g.*, *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 401 (2002) (recognizing that the ADA "seeks to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life").

Thus, Title II of the ADA specifies that "qualified individual[s] with disabilit[ies]" shall not be "excluded from participation in or be denied the benefits of" such services by reason of their disabilities. Section 202, 42 U.S.C. § 12132. In turn, a "qualified individual with a disability" is defined to be a person who,

> "with or without *reasonable modifications* to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." Section 201(2), 42 U.S.C. § 12131(2) (emphasis added).

The Attorney General's regulations issued pursuant to Section 204(a), 42 U.S.C. § 12134(a), interpret this definition to require a public entity to

> "make *reasonable modifications* in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7) (2003) (emphasis added).

Thus, Title II requires that public entities, including states, make "reasonable modifications" to their policies, practices, and procedures in order to insure that persons with disabilities can participate in and benefit from public services.

Nevertheless, when Congress enacted Title II, only four of the twenty-four states that had a statutory prohibition against disability discrimination in state services incorporated an express obligation to make such modifications with respect to such services.[31]

3. Remedies

The remedies available under state law for violations of state accessibility requirements in the provision of state services were, like the states' remedies for facilities violations, substantially more limited than the remedies available under Title II. First, taking the same twenty-four states that did provide statutory protection against disability discrimination in the provision of state services, six failed to provide for damages as a remedy for violations by the state

---

[31] Minn. Stat. Ann. § 363.03(3)(2), (4)(1) (1991) (see historical notes in 1991 database), Mo. Ann. Stat. § 213.010(8) (1990), N.C. Gen. Stat. § 168A-3(10)(b) (1990); S.D. Codified Laws § 20-13-23.7 (1990) Four other states had statutes incorporating the "programs and activities" language from the Rehabilitation Act. See Haw. Rev. Stat. Ann. § 368-1.5(a) (1990); La. Rev. Stat. Ann. § 46:2254 (1990); Mass. Gen. Laws Ann. Const. Amend. CXIV (1990); Va. Code Ann. § 51.5-40 (1990). We note that courts in these states, like this court, could interpret such language to require reasonable modification, so the lack of a specific statutory requirement may be less troubling in those states. See *Alexander* v. *Choate*, 469 U.S. 287, 300 (1985) (construing statute to mean that "while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones").

(even to remedy and deter intentional discrimination),[32] and another five significantly limited such damages.[33]

Second, of the twenty-four states that covered services, eight did not allow successful plaintiffs to obtain attorney's fees for claims involving services.[34] As discussed in more detail in Part II above, without the availability of such an award, enforcement is substantially limited, especially where the relief sought does not otherwise entail damages.

* * * *

The limitations in state laws prohibiting discrimination in access to facilities and services show that only Minnesota had statutory protections in the areas we have discussed at least as

---

[32] Colo. Rev. Stat. Ann. §§ 24-34-306, 24-34-605 (1990) (no compensatory relief); Conn. Gen. Stat. Ann. § 46a-99 (1990) (no compensatory relief); Haw. Rev. Stat. Ann. § 489-7.5 (1990) (provision allowing private right of action not effective until 1991); N.C. Gen. Stat. § 168A-11(b) (1990) (no damages); Okla. Stat. tit. 25 § 1402 (1990) (no compensatory relief); S.D. Codified Laws § 20-13-23 (1990).

[33] Kan. Stat. Ann. § 44-1005(k) (1990) (limited damages for pain suffering and humiliation to $2,000); Nev. Rev. Stat. Ann. § 651.090(1) (1991) (see historical notes in the 1991 database) (Section 41.035 (1991) imposes a $50,000 limit on tort damages against state and state employees); S.C. Code Ann. § 43-33-540 (1990) (limits actual damages to $5,000); Va. Code Ann. § 51.5-46A (1990) (no damages for pain and suffering); W. Va. Code Ann. §§ 5-11-13(c), 5-11-10 (1991) (see historical notes in 1991 database) (while compensatory damages are available in court, a complainant in an administrative proceeding could only receive incidental compensatory damages, the modern equivalent of $1,000 in 1977).

[34] See Colo. Rev. Stat. Ann. §§ 24-34-605; 24-34-306 (1990); Conn. Gen. Stat. Ann. § 46a-99 (1990) (relief provision does not include attorney's fees); Kan. Stat. Ann. § 44-1005 (1990) (same); Haw. Rev. Stat. Ann. § 489-7.5 (1990) (provision allowing attorney's fees not effective until 1991);); Okla. Stat. tit. 25 § 1402 (1990) (relief provision does not include attorney's fees); Pennsylvania (section in current law allowing attorney's fees, see Pa. Stat. Ann. tit. 43, § 962(c.2) (2003), was added in 1991); R.I. Gen. Laws § 42-87-4 (1990); S.D. Codified Laws § 20-13-24 (1990) (no attorney's fees provision).

strong as those Congress deemed adequate to ensure that persons with disabilities be able to enjoy the benefits of critical state services, programs and activities. Thus, it can hardly be said that Congress enacted the ADA, and Title II in particular, against a backdrop of sufficient or effective state laws.

IV. Invalidating Title II of the ADA Would Severely Undermine the Protections Currently Afforded to Persons with Disabilities in a Majority of States.

Unfortunately, since the enactment of the ADA, only a few states have improved their disability statutes with respect to state facilities and services. As a recent study in the University of Alabama Law Review concludes, "Our study confirms * * * [that] only a minority of states actually have statutory protection against disability discrimination * * * similar to that found in ADA Title II."[35]

Facilities access statutes remain inadequate in the majority of states. While six states have revised their statutes to allow damage suits against the state for failing to provide access to facilities,[36] none of the states that prohibited or limited such damages have abandoned these restrictions. Of the seven states that allowed a private right of action for damages but did not allow attorney's fees, only Pennsylvania has adopted such a provision.[37] Finally, none of the states that failed to

---

[35] Ruth Colker and Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075, 1113 (2002).

[36] See Ariz. Rev. Stat. Ann. § 41-1492.09 [B] (2003); Haw. Rev. Stat. Ann. § 489-7.5(a)(1) (2003); Ind. Code Ann. §§ 22-9-8-1, -3 (2003); N.D. Cent. Code § 14-02.4-20 (2003), and *State* v. *Haskell*, 621 N.W.2d 358, 360 (N.D. 2001) (finding damages are available under § 14-02.4-20); N.H. Rev. Stat. Ann. § 354-A:21 (2003); S.D. Codified Laws § 20-13-35.1 (2003).

[37] See Pa. Stat. Ann. tit. 43, § 962(c.2) (2003).

require accessibility to all state facilities in 1990 has added such a requirement.

State laws pertaining to services likewise remain inadequate today. Since 1990 only four states—Kentucky, Maine, North Dakota and Vermont—have added statutes that prohibit the state from discriminating in the provision of its services.[38] Of the six states which covered state services but did not provide a private right of action for damages, only Hawaii and South Dakota have revised their statutes to allow such relief.[39] Similarly, while eight states broadened their definition of disability to cover at least some persons with mental impairments,[40] and ten states have done so to include those with a record of impairment or who are regarded as having an impairment,[41] over twenty states still have definitions of disability more limited than the ADA.

Thus, the Brief of *Amici Curiae* Alabama *et al.* in Support of petitioner is simply wrong when it asserts (at 24) that "existing State laws are sufficient to address the vast majority of accessibility problems." In fact, the need for Title II of the ADA is as real now as it was in 1990. There can be no assurance that the state legislatures which have not acted

---

[38] Ky. Rev. Stat. Ann. §§ 344.120, 344.130 (2003); Me. Rev. Stat. Ann. tit. 5, §§ 4592, 4553 (2003); N.D. Cent. Code §§ 14-02.4-14, 14-02.4-15 (2003); Vt. Stat. Ann. tit. 9, §§ 4502(c), 4501(1) (2003).

[39] Haw. Rev. Stat. Ann. § 489-7.5 (2003) (effective in 1991), S.D. Codified Laws § 20-13-35.1 (2003).

[40] Ariz. Rev. Stat. Ann. § 41-1492 (2003); Cal. Gov't Code § 12926 (2003); Del. Code Ann. tit. 6, § 4502 (2003); Kan. Stat. Ann. § 44-1002 (2003); Ky. Rev. Stat. Ann. § 344.010 (2003); N.H. Rev. Stat. Ann. § 354-A:2 (2003); Nev. Rev. Stat. Ann. § 651.050 (2003); Wis. Stat. Ann. § 106.52(c) (2003).

[41] Ariz. Rev. Stat. Ann. § 41-1492 (2003); Cal. Gov't Code § 12926 (2003); Kan. Stat. Ann. § 44-1002 (2003); Ky. Rev. Stat. Ann. § 344.010 (2003); Me. Rev. Stat. Ann. tit. 5, § 4553 (2003); Mo. Rev. Stat. § 213.010 (2003); Mont. Code Ann. § 49-2-101 (2003); Nev. Rev. Stat. Ann. § 651.050 (2003); Pa. Stat. Ann. tit. 43, § 954 (2003); Wis. Stat. Ann. § 106.52(c) (2003).

since 1990 would act now to rectify the deficiencies in their laws if this Court were to strike down Title II as applied to the states. Yet discrimination against persons with disabilities will not simply go away. Accordingly, the comprehensive coverage and remedies available under Title II of the ADA are vital to the protection of persons with disabilities, and many persons with disabilities will be harmed if these protections are taken away.

CONCLUSION

For the reasons set forth in the Briefs for Respondents and above, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

SHARON MASLING
NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS
900 Second Street, N.E.
Washington, D.C. 20002
(202) 408-9514

JOHN TOWNSEND RICH*
JAMES CHAD OPPENHEIMER
DAVID M. BOOTH
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington D.C. 20036
(202) 828-2000

Counsel for Amicus Curiae

* Counsel of Record

November 12, 2003

Supreme Court, U.S.
FILED
NOV 12 2003
OFFICE OF THE CLERK

No. 02-1667

In the Supreme Court of the United States

OCTOBER TERM, 2003

STATE OF TENNESSEE, PETITIONER,

v.

GEORGE LANE, BEVERLY JONES, AND UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR AMICI CURIAE PARALYZED VETERANS OF AMERICA, AMERICAN PSYCHIATRIC ASSOCIATION, AND 23 OTHER ORGANIZATIONS IN SUPPORT OF RESPONDENTS

(Additional Amici Listed on Inside Cover)

Of Counsel:
Ira A. Burnim
Jennifer Mathis
JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW
1101 Fifteenth St., N.W.
Washington, D.C. 20005
(202) 467-5730

Timothy K. Armstrong*
Elizabeth B. McCallum
Andrew P. Tower
Kristien Carbonez
Thomas Dillickrath
Richard Groseclose
Kristen McAhren
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2402
(202) 783-0800

* *Counsel of Record*

Counsel for Amici Curiae

AMICI CURIAE JOINING THIS BRIEF

AARP
American Association on Mental Retardation
American Council of the Blind
American Diabetes Association
American Occupational Therapy Association
American Psychiatric Association
The Arc of the United States
Association on Higher Education and Disability
Bazelon Center for Mental Health Law
Alexander Graham Bell Association
for the Deaf and Hard of Hearing
Depression and Bipolar Support Alliance
Easter Seals
The Epilepsy Foundation®
Lambda Legal Defense and Education Fund, Inc.
National Alliance for the Mentally Ill
National Association for Rights Protection and Advocacy
National Association of Councils
on Developmental Disabilities
National Council on Independent Living
National Health Law Program
National Mental Health Association
National Mental Health Consumers'
Self-Help Clearinghouse
National Multiple Sclerosis Society
Paralyzed Veterans of America
Tennessee Disability Coalition
United Cerebral Palsy Associations, Inc.

TABLE OF CONTENTS

Interest of the Amici Curiae 1

Summary of Argument 2

Argument 3

I. Title II Of The ADA Protects A Significantly Broader Range Of Constitutional Rights Than Does Title I 3

II. The Legislative Record Confirms Congress' Specific Findings of Unconstitutional Discrimination By The States 5

III. The States Have Historically Deprived Americans With Disabilities Of Their Constitutional Rights 7

A. Patterns Of Unconstitutional State Interference With Equal and Effective Access To The Courts 7

1. States Exclude People With Disabilities From The Judicial Process As Litigants 7

2. States Exclude People With Disabilities From The Judicial Process As Jurors 10

B. Patterns Of Unconstitutional State Conduct Involving The Fundamental Right To Vote 11

1. States Disenfranchise People With Disabilities 11

2. States Deny Access To Voting Equipment And Polling Places 13

C. Patterns Of State Interference With The Fundamental Right To Marry And Form Families 14

1. States Sterilize Persons With Disabilities 14

2. States Prohibit The Marriage Of People With Disabilities 16

3. States Discriminate Against Parents With Disabilities 18

D. Patterns Of Unconstitutional State Discrimination In Education 19

E. Patterns Of Unconstitutional State Treatment Of People With Disabilities In Institutions 21

1. States Institutionalize People With Disabilities Without Necessity And Treat Them Deplorably While They Are In Civil Institutions 21

2. States Ignore The Medical Needs Of Prisoners With Disabilities And Otherwise Violate Their Constitutional Rights 24

F. Patterns Of Irrational State Segregation Of People With Disabilities From The Community 27

Conclusion 28

APPENDICES

The Amici Organizations 1a

Non-Current Statutes Cited in Brief as Examples of States Imposing Restrictions on Jury Service 10a

Non-Current Statutes Cited in Brief as Examples of States Excluding Students With Disabilities from Public Education 11a

Non-Current Statutes Cited in Brief as Examples of States Restricting Right to Marry and Form Families 11a

TABLE OF AUTHORITIES

Cases

A.W., In re,
637 P.2d 366 (Colo. 1981) 15, 16

Adoption of Richardson,
59 Cal. Rptr. 323 (Ct. App. 1967) 19

American Association of People with Disabilities v. *Smith*,
227 F. Supp. 2d 1276 (M.D. Fla. 2002) 14

Armstrong v. *Davis*,
275 F.3d 849 (9th Cir. 2001), cert. denied,
537 U.S. 812 (2002) 8

Association of Relatives and Friends of Aids Patients v.
Regulations and Permits Admin.,
740 F. Supp. 95 (D.P.R. 1990) 28

Association for Retarded Citizens v. *Olson*,
561 F. Supp. 473 (D.N.D. 1982), aff'd,
713 F.2d 1384 (8th Cir. 1983) 23

Baby Neal v. *Casey*,
821 F. Supp. 320 (E.D. Pa. 1993) 19

Bangerter v. *Orem City Corp.*,
46 F.3d 1491 (10th Cir. 1995) 27

Batson v. *Kentucky*,
476 U.S. 79 (1986) 10

Bednarski v. *Bednarski*,
366 N.W.2d 69 (Mich. Ct. App. 1985) 18

Board of Trustees of the University of Alabama v. *Garrett*,
531 U.S. 356 (2001) 3, 5

Boddie v. *Connecticut*,
401 U.S. 371 (1971) 7

Brown v. *Board of Education*,
347 U.S. 483 (1954) 19

Buck v. *Bell*,
274 U.S. 200 (1927) 15

Carey v. *Population Services International*,
431 U.S. 678 (1977) 14

Carter v. *Jury Commission*,
396 U.S. 320 (1970) 10

City of Boerne v. *Flores*,
521 U.S. 507 (1997) 5

City of Cleburne v. *Cleburne Living Center, Inc.*,
473 U.S. 432 (1985) 4, 12, 17, 23, 27

Clark v. *Cohen*,
794 F.2d 79 (3d Cir. 1986) 23

Clark v. *Jeter*,
486 U.S. 456 (1988) 4

Clark v. *Madden*,
725 N.E.2d 100 (Ind. Ct. App. 2000) 18

Clarkson v. *Coughlin*,
898 F. Supp. 1019 (S.D.N.Y. 1995) 9

Coleman v. *Wilson*,
912 F. Supp. 1282 (E.D. Cal. 1995) 26

Cook v. *State*,
495 P.2d 768 (Or. 1972) 15

Cruzan v. *Director, Missouri Department of Health*,
497 U.S. 261 (1990) 14

DeLong v. *Brumbaugh*,
703 F. Supp. 399 (W.D. Pa. 1989) 11

Doe v. *Rowe*,
156 F. Supp. 2d 35 (D. Me. 2001) 12

Downs v. *Sawtelle*,
574 F.2d 1 (1st Cir. 1978) 16

Duvall v. *County of Kitsap*,
260 F.3d 1124 (9th Cir. 2001) 8

Eckstein v. *Kirby*,
452 F. Supp. 1235 (E.D. Ark. 1978) 10

Eisenstadt v. *Baird*,
405 U.S. 438 (1972) 14

Epicenter, Inc. v. *City of Steubenville*,
924 F. Supp. 845 (S.D. Ohio 1996) 27

Eric L. ex rel. Schierberl v. *Bird*,
848 F. Supp. 303 (D.N.H. 1994) 24

Estelle v. *Gamble*,
429 U.S. 97 (1976) 25

Faretta v. *California*,
422 U.S. 806 (1975) 7

Galloway v. *Superior Court*,
816 F. Supp. 12 (D.D.C. 1993) 11

Gary W. v. *Louisiana*,
437 F. Supp. 1209 (E.D. La. 1976) 22

Gary W. v. *Louisiana*,
1990 U.S. Dist. LEXIS 1746 (E.D. La.
Feb. 15, 1990) 22

Gregg v. *Georgia*,
428 U.S. 153 (1976) 25

H.J.B. v. *P.W.*,
628 So. 2d 753 (Ala. Civ. App. 1993) 19

Halderman v. *Pennhurst State Sch. & Hospital*,
446 F. Supp. 1295 (E.D. Pa. 1977), rev'd,
451 U.S. 1 (1980) 23

Harper v. *Virginia State Board of Elections*,
383 U.S. 663 (1966) 11

Hill v. *New York State Board of Elections*,
503 N.Y.S.2d 958 (Sup. Ct. 1986) 14

Hill v. *Shelby County*,
599 F. Supp. 303 (N.D. Ala. 1984) 10

Honig v. *Doe*,
484 U.S. 305 (1988) 20

Interest of T.N.V., In re,
855 S.W.2d 102 (Tex. App.—Corpus Christi 1993) .. 19

Jackson v. *Ft. Stanton Hospital & Training Sch.*,
757 F. Supp. 1243 (D.N.M. 1990), rev'd,
964 F.2d 980 (10th Cir. 1992) 24

Jones v. *New York City Transit Authority*,
483 N.Y.S.2d 623 (Civ. Ct. 1984) 10

Kiman v. *New Hampshire Department of Corrections*,
301 F.3d 13 (1st Cir. 2002), aff'd,
332 F.3d 29 (1st Cir. 2003) 25

Larkin v. *Michigan*,
883 F. Supp. 172 (E.D. Mich. 1994), aff'd,
89 F.3d 285 (6th Cir. 1996) 27

Layton v. *Elder*,
143 F.3d 469 (8th Cir. 1998) 8

Lelsz v. *Kavanagh*,
673 F. Supp. 828 (N.D. Tex. 1987) 23

Lewinson v. *Crews*,
282 N.Y.S.2d 83 (App. Div. 1967) 10

Logan v. *Zimmerman Brush Co.*,
455 U.S. 422 (1982) 7

Manhattan State Citizens' Group Inc. v. *Bass*,
524 F. Supp. 1270 (S.D.N.Y. 1981) 13

Marriage of Carney, In re,
598 P.2d 36 (Cal. 1979) 19

Marriage of R.R., In re,
575 S.W.2d 766 (Mo. Ct. App. 1978) 19

McKinney v. *McKinney*,
805 S.W.2d 66 (Ark. 1991) 15

Meyer v. *Nebraska*,
262 U.S. 390 (1923) 16

Miles v. *Apex Marine Corp.*,
498 U.S. 19 (1990) 6

Mills v. *Board of Education*,
348 F. Supp. 866 (D.D.C. 1972) 20

Motes v. *Hall County Dep't of Family & Children Servs.*,
306 S.E.2d 260 (Ga. 1983) 15

Moye v. *Moye*,
627 P.2d 799 (Idaho 1981) 19

National Organization on Disability v. *Tartaglione*,
2001 WL 1231717 (E.D. Pa. Oct. 11, 2001) 13

Nevada Dep't of Human Resources v. *Hibbs*,
123 S. Ct. 1972 (2003) 4

O'Connor v. *Donaldson*,
422 U.S. 563 (1975) 23

Panitch v. *Wisconsin*,
444 F. Supp. 320 (E.D. Wis. 1977) 20

Parrish v. *Johnson*,
800 F.2d 600 (6th Cir. 1986) 25

Pennsylvania Ass'n for Retarded Children v. *Pennsylvania*,
343 F. Supp. 279 (E.D. Pa. 1972) 20

Pennsylvania Dep't of Corrs. v. *Yeskey*,
524 U.S. 206 (1998) 25

People v. *Guzman*,
555 N.E.2d 259 (N.Y. 1990) 10

People v. *Rivera*,
480 N.Y.S.2d 426 (Sup. Ct. 1984) 9

Poe v. *Lynchburg Training Sch. & Hospital*,
518 F. Supp. 789 (W.D. Va. 1981) 15

Popovich v. *Cuyahoga County Court of Common Pleas*,
276 F.3d 808 (6th Cir.), cert. denied,
537 U.S. 812 (2002) 4, 7

Reno v. *Flores*,
507 U.S. 292 (1993) 4

Reynolds v. *Sims*,
377 U.S. 533 (1964) 11

Robinson v. *Kansas*,
117 F. Supp. 2d 1124 (D. Kan. 2000), aff'd,
295 F.3d 1183 (10th Cir. 2002), cert. denied,
123 S. Ct. 2574 (2003) 21

Ruiz v. *Estelle*,
503 F. Supp. 1265 (S.D. Tex. 1980), aff'd,
679 F.2d 1115 (5th Cir. 1982) 26

San Antonio Independent Sch. Dist. v. *Rodriguez*,
411 U.S. 1 (1973) 19

Skinner v. *Oklahoma*,
316 U.S. 535 (1942) 16

Society for Good Will to Retarded Children v. *Cuomo*,
745 F. Supp. 879 (E.D.N.Y. 1990) 23

Stanley v. *Illinois*,
405 U.S. 645 (1972) 18

State v. *Spivey*,
700 S.W.2d 812 (Mo. 1985) 11

Sterilization of Moore, In re,
221 S.E.2d 307 (N.C. 1976) 15

Stump v. *Sparkman*,
435 U.S. 349 (1978) 16

T.E.P. v. *Leavitt*,
840 F. Supp. 110 (D. Utah 1993) 17

Thomas S. v. *Morrow*,
781 F.2d 367 (4th Cir. 1986) 24

Troxel v. *Granville*,
530 U.S. 57 (2000) 18

Turner Broad. System v. *FCC*,
520 U.S. 180 (1997) 6, 6

Weems v. *United States*,
217 U.S. 349 (1910) 24

Wisconsin v. *Yoder*,
406 U.S. 205 (1972) 18

Wyatt ex rel. Rawlins v. *Rogers*,
985 F. Supp. 1356 (M.D. Ala. 1997) 22

Wyatt v. *Stickney*,
344 F. Supp. 387 (M.D. Ala. 1972), aff'd,
503 F.2d 1305 (5th Cir. 1974) 22

Yarbaugh v. *Roach*,
736 F. Supp. 318 (D.D.C. 1990) 26

Youngberg v. *Romeo*,
457 U.S. 307 (1982) 21

Zablocki v. *Redhail*,
434 U.S. 374 (1978) 17

Constitutional and Statutory Provisions

20 U.S.C. § 1400(c)(2) 20

42 U.S.C. § 12101(a) 3

42 U.S.C. § 12101(a)(2) 6

42 U.S.C. § 12101(a)(3) 5, 11, 21, 21

42 U.S.C. § 12101(a)(5) 6, 21

42 U.S.C. § 12101(a)(6) 6

42 U.S.C. § 12101(a)(7) 5, 6

42 U.S.C. § 12101(b)(4) 2

42 U.S.C. § 12131(1)(A) 3

42 U.S.C. § 12132 ..... 3, 5

ALA. CODE § 12-16-60 (1995) 11

ALASKA CONST. art. V, § 2 (2000) 12

ARK. CODE ANN. § 16-31-102 (1987), amended,
1994 Ark. Acts No. 4, § 6 10

ARK. CONST. art. 3, § 5 (1987) 12

ARK. CONST. amend. 51 § 11(a)(6) (2001) 12

CAL. CIV. CODE § 4201 (1987) 17

CONN. GEN. STAT. § 8-3f (2001) 28

D.C. CODE ANN. § 30-103 (1981) 17

D.C. CODE ANN. § 46-403 (2001) 17

DEL. CODE ANN. tit. 15, § 1701 (1999) 12

DEL. CODE ANN. tit. 22, § 309 (2002) 28

DEL. CONST. art. 5, § 2 (Supp. 2000) 12

DEL. CONST. art. 10, § 1 (1975) 20

HAW. CONST. art. 2, § 2 (1997) 12

IND. CODE § 22-1601 (1950) 16

IOWA CODE ANN. § 595.3 (1990) 17

IOWA CONST. art. 2, § 5 (2000) 12

KAN. CONST. art. 5, § 2 (1988) 12

KY. CONST. § 145(3) (2002) 12

KY. REV. STAT. § 116.025(1) (1993) 12

KY. REV. STAT. § 387.590 (1984) 12

MD. CODE ANN., CTS. & JUD. PROC. § 8-207 (2002) ... 11

MD. CODE ANN., ELEC. § 3-102(b)(2) (2002) 12

MD. CONST. art. 1, § 4 (1981) 12

MASS. ANN. LAWS ch. 51, § 1 (1991) 12

MASS. ANN. LAWS CONST. AMEND. art. 3 (2002) 12

MICH. COMP. LAWS § 551.6 (1988) 17

MISS. CODE ANN. § 23-15-11 (1999) 12

MISS. CODE ANN. § 41-21-45 (1990) 17

MISS. CODE ANN. § 41-45-1 (1999) 15

MISS. CODE ANN. § 41-45-9 (1999) 15

MISS. CODE ANN. § 93-1-5 (1999) 17

MISS. CONST. art. 12, § 241 (1999) 12

MONT. CODE ANN. § 13-1-111(3) (1999) 12

MONT. CONST. art. 4, § 2 (2001) 12
N.J. CONST. art. 2, § 6 (Supp. 1999) 12
N.J. STAT. ANN. § 2B:201 (2002) 11
N.J. STAT. ANN. § 19:4-1(1) (2001) 12
N.M. CONST. art. 7, § 1 (1992) 12
N.M. STAT. ANN. § 1-1-4 (Michie 1995) 12
NEB. CONST. Art. 6, § 2 (2001) 12
NEB. REV. STAT. ANN. § 32-313(1) (Michie 2000) 12
NEV. CONST. art. 2, § 1 (1998) 12
OHIO CONST. art. 5, § 6 (1994) 12
PA. STAT. ANN. tit. 48, § 1-5 (West 1990) 17
R.I. CONST. art. 2, § 1 (2002) 12
R.I. GEN. LAWS § 15-1-5 (1988) 17
TENN. CODE ANN. § 36-3-109 (2001) 17
UTAH CODE ANN. § 30-1-2(1) (1987) 17
VT. CONST. ch. 2, § 42 (1996) 12
VT. STAT. ANN. tit. 15, § 512 (1989) 17
VT. STAT. ANN. tit. 15, § 514 (1989) 17
VT. STAT. ANN. tit. 24, § 4409(f) (2002) 28
W. VA. CODE § 48-2-2 (1990) 17
WYO. STAT. § 1-11-101 (2002) 11

Other Authorities

Council of State Governments, *Criminal Justice / Mental Health Consensus Project* (June 2002), *at* http://consensusproject.org 26

Sharon P. Davis, *A Status Report to the Nation on People with Mental Retardation Waiting for Community Services* (1997), *at* http://www.thearc.org/misc/WaitPage.html 24

Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201 (1990) 18

Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* (Oct. 2003), *at* http://www.hrw.org/reports/2003/usa1003/ 26

Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, DOJ, to The Honorable Thomas J. Vilsack, Governor of Iowa (July 9, 2002), *at* http://www.usdoj.gov/crt/split/documents/ia_findings_wsrc_gsrc.htm 22

N.Y. State Comm'n on Quality of Care for the Mentally Disabled, *Survey of Access to New York State Courts For Individuals With Disabilities* (June 1994), *at* http://www.cqc.state.ny.us/publications/pubcourt.htm 9

Price & Burt, *Sterilization, State Action and the Concept of Consent*, 1 LAW & PSYCH. REV. 57 (1978) 15

Phillip R. Reilly, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES (1991) 14

Bruce Dennis Sales, et al., DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES (Plenum Press 1982) 17

D. Schein, *At Home Among Strangers* (1989) 24

Kay Schriner, et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437 (2000) 12

Summary of Survey and Public Hearing Reports of the Access for Persons with Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee (Jan. 1997), *at* http://www.courtinfo.ca.gov/reference/summarydisabilities.htm 9

U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983) 21, 23

U.S. General Accounting Office, *Mental Health: Improper Restraint or Seclusion Use Places People at Risk* (Sept. 1999), *at* http://www.gao.gov/archive/1999/he99176.pdf 22

INTEREST OF THE AMICI CURIAE

Amici curiae are twenty-five associations of people with disabilities, public interest groups, professional organizations, and other organizations that advocate for the rights of people with disabilities, including AARP, American Association on Mental Retardation, American Council of the Blind, American Diabetes Association, American Occupational Therapy Association, American Psychiatric Association, The Arc of the United States, Association on Higher Education and Disability, Bazelon Center for Mental Health Law, Alexander Graham Bell Association for the Deaf and Hard of Hearing, Depression and Bipolar Support Alliance, Easter Seals, The Epilepsy Foundation®, Lambda Legal Defense and Education Fund, Inc., National Alliance for the Mentally Ill, National Association for Rights Protection and Advocacy, National Association of Councils on Developmental Disabilities, National Council on Independent Living, National Health Law Program, National Mental Health Association, National Mental Health Consumers' Self-Help Clearinghouse, National Multiple Sclerosis Society, Paralyzed Veterans of America, Tennessee Disability Coalition, and United Cerebral Palsy Associations, Inc. These organizations, the interests of which are described in greater detail in the Appendix, wish to ensure that the Court is fully apprised of the extensive evidence of the States' patterns of unconstitutional treatment of people with disabilities supporting Congress' abrogation of Eleventh Amendment immunity for violations of Title II of the Americans with Disabilities Act ("ADA").[1]

1. The parties have consented to the filing of this brief under S. Ct. R. 37.2, and their letters of consent have been lodged with the Clerk of the Court. Pursuant to S. Ct. R. 37.6, *amici* state that counsel for a party did not author this brief in whole or in part and that no one other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

State governments have compiled a reprehensible, decades-long record of unconstitutional treatment, including deprivations of fundamental rights, of Americans with a broad range of physical or mental disabilities—a record that Petitioner and its supporting *amici* do not seriously contest. To redress such treatment, Congress expressly invoked the full "sweep of Congressional authority, including the power to enforce the Fourteenth Amendment[,]" when it enacted the ADA. 42 U.S.C. § 12101(b)(4). Congress enacted Title II of the ADA against a backdrop that included ample evidence that States were unconstitutionally excluding people with disabilities from voting and from accessing the judicial system, prohibiting them from marrying and raising families, warehousing them in institutions in deplorable conditions, and otherwise systematically, irrationally, and intentionally depriving them of the rights guaranteed by the Fourteenth Amendment. Unfortunately, regular instances of such unconstitutional State behavior persist even today.

Undersigned *amici* anticipate that Respondents and the United States will detail the extensive evidence of State-sponsored unconstitutional treatment of people with disabilities contained in Congress' legislative record. This brief, therefore, describes the compelling history of State unconstitutional conduct found in judicial decisions and the public record. The examples in this brief, although necessarily limited by space constraints, confirm what is also plain in Congress' specific statutory findings and in the legislative history: Congress properly exercised its power under § 5 of the Fourteenth Amendment when it abrogated the States' Eleventh Amendment immunity for violations of Title II of the ADA, and Title II represents a congruent and proportional response to the longstanding pattern of State constitutional violations.

ARGUMENT

I.

TITLE II OF THE ADA PROTECTS A SIGNIFICANTLY BROADER RANGE OF CONSTITUTIONAL RIGHTS THAN DOES TITLE I

The "first step" in analyzing the constitutionality of Congress' abrogation of Eleventh Amendment immunity "is to identify with some precision" the scope of the constitutional right at issue. *Board of Trustees of the University of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001). Title II of the ADA protects a different, and significantly broader, range of constitutional rights than the Title I provisions that this Court analyzed in *Garrett*. Title I encompasses only discrimination in employment. Title II, in contrast, applies directly and explicitly to States, and encompasses a broad range ofState conduct in the provision of public services and benefits.[2]

Garrett found that State discrimination against people with disabilities in employment matters is constitutional unless the State's action lacks a rational basis. *Id.* at 365–367 (citing *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)). The Court recognized, however, that a separate analysis of the scope of the constitutional right at issue would be appropriate under Title II. *Id.* at 360 n.1 ("Title II * * * has somewhat different remedial provisions" from Title I; declining to address applicability of Title II to issue before the Court).

As is evident from Congress' statutory findings, 42 U.S.C. § 12101(a), the sphere of conduct regulated under Title II implicates a number of constitutional rights with heightened substantive protection—the rights to vote, to marry, to access the courts, and the like. Accordingly, in addition to the type of equal protection/rational basis claims

2. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. "[P]ublic entit[ies]" include States and State instrumentalities and agencies. *Id.* § 12131(1)(A).

at issue in *Garrett* and *City of Cleburne*, the "history and pattern" of State-sponsored unconstitutional behavior that Congress examined in enacting Title II properly "encompasse[d] various due process-type claims with varying standards of liability." *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 813 (6th Cir.), cert. denied, 537 U.S. 812 (2002).

Assessment of many of the due process and equal protection-type violations encompassed within Title II requires heightened scrutiny because, in contrast to the discriminatory employment practices at issue in *Garrett*, many Title II violations involve the exercise of fundamental constitutional rights. When a due process claim involves a right that this Court has deemed fundamental, it is well settled that the Fourteenth Amendment's due process clause includes "a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno* v. *Flores*, 507 U.S. 292, 301–302 (1993); *City of Cleburne*, 473 U.S. at 440 (heightened scrutiny justified "when state laws impinge on personal rights protected by the Constitution"). It is equally well settled that when differential State treatment challenged under the equal protection clause impinges on a fundamental constitutional right, the discrimination is assessed under a strict scrutiny, not a rational basis, standard. *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988).

Accordingly, the "history and pattern" of State-sponsored discrimination underlying Title II includes not only irrational differential treatment of people with disabilities—although there is plenty of such conduct to be found—but also unconstitutional State conduct with respect to people with disabilities and their fundamental constitutional rights. As this Court concluded in *Nevada Dep't of Human Resources* v. *Hibbs*, 123 S. Ct. 1972, 1982 (2003), legislation is more readily sustained under the Fourteenth Amendment when it serves to secure constitutional rights warranting heightened scrutiny, because Congress can more readily find a pattern of conduct that fails the more

demanding constitutional standards.

II.
THE LEGISLATIVE RECORD CONFIRMS CONGRESS' SPECIFIC FINDINGS OF UNCONSTITUTIONAL DISCRIMINATION BY THE STATES

The second part of *Garrett*'s analysis asks whether Congress enacted Title II in response to "a history and pattern" of unconstitutional discrimination by the States. 531 U.S. at 368. In *Garrett*, the Court noted "strong evidence" that Congress' "failure to mention States in its legislative findings *addressing discrimination in employment* reflects that body's judgment that no pattern of unconstitutional state action had been documented." *Id.* at 372 (emphasis added).

Here, exactly the opposite is true: Congress' statutory findings are "strong evidence" that Congress could, and did, identify a pattern of unconstitutional State action in the areas that it addressed in Title II. Thus, Congress' findings explicitly and unambiguously encompass discrimination in *public* areas that are *largely or entirely within the purview of the States*, as well as multiple areas that indisputably include State conduct. 42 U.S.C. § 12101(a)(3) (finding persistent discrimination against individuals with disabilities in such "critical areas" as "education,transportation, * * * institutionalization, health services, voting, and access to public services"). Congress also specifically found that the discrimination at issue was *irrational*, noting a "history of purposeful unequal treatment * * *resulting from stereotypic assumptions." *Id.* § 12101(a)(7). Based on these findings, Congress aimed Title II directly at State conduct. *Id.* § 12132.

Congress' findings command substantial deference. *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997). Congress and the courts are coequal actors with separate and different roles in our tripartite system of government. Congress is uniquely suited to make determinations based on a wider and different set of information than that available to courts adjudicating specific cases. Judicial deference to Congress' determinations recognizes Congress' skill in per-

forming its specifically legislative function. *Turner Broad. Sys.* v. *FCC*, 520 U.S. 180, 195 (1997) ("We owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.") (citations omitted).

Congress' findings of State discrimination in areas encompassed by Title II are also amply supported by the ADA's legislative history—as *amici* anticipate will be detailed in the briefs for Respondents and the United States—and by the extensive examples from the judicial and public record described in Section III below. The Court need not limit its review to the specific legislative record, although that record is replete with examples of unconstitutional State conduct in the areas encompassed by Title II. *Turner*, 520 U.S. at 200, 209, 211–213 (examining evidence outside the legislative record to evaluate Congress' exercise of legislative power). This brief provides a sampling of the judicial decisions and other public materials that demonstrate that States regularly deprived people with disabilities of their constitutional rights. The Court can, and should, presume that Congress was aware of such decisions when it enacted Title II. *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (courts should presume that Congress is aware of relevant legal precedents).[3] The record reveals, furthermore, that such unconstitutional behavior continues to the present day.

3. Moreover, even the numerous published decisions finding unconstitutional State behavior do not fully reflect the pervasive extent of such conduct, in light of Congress' findings of invidious and persistent social and political segregation and isolation, and the resulting powerlessness, of people with disabilities. 42 U.S.C. § 12101(a)(2), (5), (6), (7).

III.
THE STATES HAVE HISTORICALLY DEPRIVED AMERICANS WITH DISABILITIES OF THEIR CONSTITUTIONAL RIGHTS

A. *Patterns Of Unconstitutional State Interference With Equal And Effective Access To The Courts*

1. States Exclude People With Disabilities From The Judicial Process As Litigants

States have historically denied persons with disabilities an equal opportunity to use the State courts as litigants by not providing interpreters or other necessities for effective communication, or by imposing architectural barriers that exclude persons with mobility or sensory impairments from using the court system. Such inaccessibility violates due process principles when people with disabilities are unable effectively to access the judicial system, either in the criminal or civil context. For criminal defendants, the due process clause guarantees that an "accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975). Parties in civil litigation have an analogous due process right to be present in the courtroom and to participate meaningfully in the process unless their exclusion furthers an important governmental interest. See, *e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) ("[t]he Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances"); *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971) (except in extraordinary circumstances, state must provide all civil litigants a meaningful opportunity to be heard).

Examples of exclusion from the judicial process in the civil arena are common. In *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir.), cert. denied, 537 U.S. 812 (2002), for instance, a person who was partially deaf alleged that the State court failed to provide

him with adequate hearing assistance in his child custody case in violation of his equal protection and due process rights. The Sixth Circuit noted the fundamental nature of the rights at stake in parental custody hearings, and the procedural safeguards that this Court has repeatedly held are necessary in such hearings, including counsel for indigent defendants and free access to the trial records. *Id.* at 813–814 (citing *Lassiter* v. *Dep't of Social Servs.*, 452 U.S. 18, 30 (1981); *Santowsky* v. *Kramer*, 455 U.S. 745, 769–770 (1982); *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 128 (1996)). The court explained that "a state's failure to accommodate plaintiff's deafness may greatly increase the risk of error in the proceeding, precluding one side from responding to charges made by the opposing party, an essential element of our adversary system." *Id.* at 815. Concluding that the suit raised "obvious due process problems," the Sixth Circuit remanded the case for retrial on the unreasonable exclusion claim.[4] Because the Due Process Clause itself required the State to accommodate the parent's disability in the custody proceedings, Title II of the ADA plainly represents a congruent and proportional legislative response as applied in such circumstances. See *ibid.*

State criminal justice systems have also maintained barriers that effectively exclude persons with disabilities from participating meaningfully in judicial and related administrative proceedings, even when their own liberty is at stake. In *Armstrong* v. *Davis*, 275 F.3d 849 (9th Cir. 2001), cert. denied, 537 U.S. 812 (2002), for instance, a class of prisoners with disabilities alleged that California failed to provide them adequate access to, and a meaningful opportunity to participate in, their parole hearings. The process depended "to a great extent" on written forms; prisoners and parolees with disabilities were "provided with inade-

4. The court below applied *Popovich* when ruling on the cases now before this Court for review. See also, *e.g.*, *Layton* v. *Elder*, 143 F.3d 469, 472 (8th Cir. 1998) (finding state courts physically inaccessible to quadriplegic civil litigant); *Duvall* v. *County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001) (finding material facts in dispute over whether county court proceedings were effectively inaccessible to hearing-impaired litigant).

quate accommodations to help them understand the content of those forms, and as a consequence some plaintiffs waived their rights to a hearing and others failed to invoke their rights on appeal." *Id.* at 857 (footnote omitted). The system did not provide American Sign Language interpretation services, Braille copies of documents, qualified readers, or staff capable of effectively communicating with prisoners and parolees with mental retardation or mental disabilities. *Id.* at 858 n.10. Affirming a lower court decision on ADA grounds, the Ninth Circuit held that the "minimal due process measures taken [by the defendant parole board] were insufficient to comply with the ADA or to enable plaintiffs properly to invoke or assert their rights." *Id.* at 862. Furthermore, there was no reasonable relation to any legitimate penological interest that could justify the impingement on the prisoners', and parolees', constitutional rights. *Id.* at 873–874.[5]

These kinds of problems, which prevent people with disabilities from effectively accessing the judicial system and vindicating their rights, are all too common. In 1997, for instance, the California Judicial Council concluded that many California courts conducted their proceedings in buildings that were not accessible to persons with disabilities, lacked proper communications equipment, provided too few interpreters, and otherwise denied equal access to persons with disabilities.[6]

5. See also *People* v. *Rivera*, 480 N.Y.S.2d 426 (Sup. Ct. 1984) (deprivation of due process where defendant with hearing impairment was sentenced as two time offender, and in earlier convictions, had been denied services of an interpreter); *Clarkson* v. *Coughlin*, 898 F. Supp. 1019, 1033 (S.D.N.Y. 1995) (failure to provide interpreters for inmates with hearing impairments for parole and disciplinary hearing violates due process).

6. *Summary of Survey and Public Hearing Reports of the Access for Persons with Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee* 8–12 (Jan. 1997), *at* http://www.courtinfo.ca.gov/reference/summarydisabilities.htm; see also N.Y. State Comm'n on Quality of Care for the Mentally Disabled, *Survey of Access to New York State Courts For Individuals With Disabilities* (June 1994) (only 8% of New York courts fully accessible to people with disabilities; "significant barriers" to access remain), *at* http://www.cqc.state.ny.us/publications/pubcourt.htm.

2. States Exclude People With Disabilities From The Judicial Process As Jurors

"Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others * * * than it may invidiously discriminate in the offering * * * of the elective franchise." *Carter* v. *Jury Comm'n*, 396 U.S. 320, 330 (1970). "The harm from discriminatory jury selection * * * touch[es] the entire community." *Batson* v. *Kentucky*, 476 U.S. 79, 87 (1986). There is no compelling interest in, nor any rational basis for, excluding people with physical and mental disabilities from jury service without regard to their individual ability to function effectively as jurors. Nonetheless, when Congress passed the ADA, it was relatively common for State courts categorically to refuse to allow people with certain disabilities to sit on juries. See, *e.g.*, *Hill* v. *Shelby County*, 599 F. Supp. 303, 304 (N.D. Ala. 1984) (noting that state courts "routinely excuse" from service "jurors who have severe physical disabilities").

For example, the State of New York barred persons with disabilities from jury service for more than 150 years, a practice which ended only upon the enactment of the ADA.[7] Until 1994, Arkansas barred people with "substantial impairments" to hearing or sight from participating as jurors. ARK. CODE ANN. § 16-31-102 (1987), amended, 1994 Ark. Acts No. 4, § 6 (1994);[8] see also *Eckstein* v. *Kirby*, 452 F. Supp. 1235, 1243 (E.D. Ark. 1978) (finding hearing- or vision-impaired jurors unfit to serve). The District of

7. *Lewinson* v. *Crews*, 282 N.Y.S.2d 83, 84–86 (App. Div. 1967) (excluding a blind college professor as a juror); *id.* at 87–88 (Hopkins, J., dissenting) (law in force since 1829), aff'd, 236 N.E.2d 853 (N.Y. 1968). New York courts continued to exclude all blind persons from jury service until the 1980s. *E.g.*, *Jones* v. *New York City Transit Auth.*, 483 N.Y.S.2d 623, 625–626 (Civ. Ct. 1984). Only upon the passage of the ADA did the New York state courts cease excluding disabled persons solely because of their status and without regard to their individual abilities. *People* v. *Guzman*, 555 N.E.2d 259, 261 (N.Y. 1990).

8. Copies of all non-current statutes cited in this brief are reproduced in the Appendix. The cited statutes are offered only as exemplars, and do not purport to represent *all* the discriminatory statutes in a particular area.

Columbia Superior Court continued to exclude all blind persons from jury service through 1993. *Galloway* v. *Superior Court*, 816 F. Supp. 12, 16–17 (D.D.C. 1993) (the "conclusion that blind jurors are not qualified appears based on exactly the archaic attitudes and unsubstantiated prejudices Congress wished to eradicate" with ADA). In *DeLong* v. *Brumbaugh*, 703 F. Supp. 399, 406 (W.D. Pa. 1989), a judge serving on Pennsylvania's superior court testified that "he would disqualify a deaf person under all circumstances." In 1985, the Missouri Supreme Court permitted the categorical exclusion of "deaf, mute, deaf-mute, and blind persons, from inclusion in the jury pool." *State* v. *Spivey*, 700 S.W.2d 812, 813–814 (Mo. 1985) ("We doubt that deaf persons have a community of attitudes or ideas."). Even today, a number of States have statutes that limit jury service to those who can "read," "write," or "speak" English, with no statutory exception for people who use American Sign Language or Braille—the same statutes that supported categorical exclusion of deaf and blind jurors in *Spivey* and *DeLong*. See, *e.g.*, ALA. CODE § 12-16-60 (1995); MD. CODE ANN., CTS. & JUD. PROC. § 8-207 (2002); N.J. STAT. ANN. § 2B:201 (2002); cf. also WYO. STAT. § 1-11-101 (2002) (jurors "in possession of * * * natural facilities").

B. Patterns Of Unconstitutional State Conduct Involving The Fundamental Right To Vote

When it passed the ADA, Congress found persistent discrimination in the "critical" area of "voting." See 42 U.S.C. § 12101(a)(3). The fundamental right to vote is "preservative of other basic civil and political rights." *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964). Classifications infringing the ability to exercise the right to vote must be examined under strict scrutiny. *Harper* v. *Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966).

1. States Disenfranchise People With Disabilities

States have historically prevented Americans with mental disabilities from exercising their fundamental right to vote through a host of laws, many of which are still on the books. Forty-two States currently have laws disenfranchis-

ing Americans with mental disabilities in a variety of contexts.[9] See *Doe* v. *Rowe*, 156 F. Supp. 2d 35, 38 n.2 (D. Me. 2001). Similar and more egregious laws were on the books when Congress enacted the ADA. Indeed, the concurring opinion in *City of Cleburne* had described them just five years before. 473 U.S. at 464 (citing 1979 article finding that "most states still categorically disqualified 'idiots' from voting") (Marshall, J., concurring in part and dissenting in part).[10]

Such laws are unconstitutional when, facially or as applied, they categorically exclude people with disabilities from voting, without reference to individual competence.

9. See, *e.g.*, ALASKA CONST. art. V, § 2 (2000) (persons of unsound mind); ARK. CONST. art. 3, § 5 (1987); *id.* amend. 51 § 11(a)(6) (2001) (idiots or insane; adjudicated mentally incompetent); DEL. CONST. art. 5, § 2 (Supp. 2000); DEL. CODE ANN. tit. 15 § 1701 (1999) (idiot or insane); HAW. CONST. art. 2, § 2 (1997) (*non compos mentis*); IOWA CONST. art. 2, § 5 (2000) (idiot or insane); KAN. CONST. art. 5, § 2 (1988) (mental illness); KY. CONST. § 145(3) (2002); KY. REV. STAT. §§ 116.025(1) (1993), 387.590 (1984); MD. CONST. art. 1, § 4 (1981); MD. CODE ANN., ELEC. § 3-102(b)(2) (2002) (under care or guardianship for mental disability); MASS. ANN. LAWS CONST. AMEND. art. 3 (2002); MASS. ANN. LAWS ch. 51, § 1 (1991) (under guardianship); MISS. CONST. art. 12, § 241 (1999); MISS. CODE ANN. § 23-15-11 (1999) (idiots and insane); MONT. CONST. art. 4, § 2 (2001); MONT. CODE ANN. § 13-1-111(3) (1999) (adjudicated unsound mind unless finding reversed); NEB. CONST. art. 6, § 2 (2001); NEB. REV. STAT. ANN. § 32-313(1) (Michie 2000) (*non compos mentis*); NEV. CONST. art. 2, § 1 (1998) (idiot or insane); N.J. CONST. art. 2, § 6 (Supp. 1999); N.J. STAT. ANN. § 19:4-1(1) (2001) (idiot or insane); N.M. CONST. art. 7, § 1 (1992); N.M. STAT. ANN. § 1-1-4 (Michie 1995) (idiots or insane); OHIO CONST. art. 5, § 6 (1994) (idiots or insane); R.I. CONST. art. 2, § 1 (2002) (adjudicated *non compos mentis*); VT. CONST. ch. 2, § 42 (1996) (not quiet and peaceable). See Kay Schriner, et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437, 456 tbl. 2 (2000), for a chart describing these statutes. Many of the referenced statutory provisions continue to use what are now recognized as archaic, inexact, and pejorative terms, such as "lunatic" and "idiot," to describe the class of persons whose exercise of democratic rights are to be denied. Such imprecise categorization is itself suggestive of arbitrariness and discriminatory animus rather than legislative rationality, much less a compelling legislative interest or narrow tailoring.

10. When Congress enacted the ADA, the American Bar Association had opined that most of these statutes were unconstitutional. Schriner, *supra* note 9, at 451.

Such categorical exclusions serve no compelling State interest in protecting the integrity of the electoral process, much less provide the least restrictive means of doing so. Indeed, it is difficult to articulate how such laws meet even minimal standards of due process. One recent case overturning a fairly typical State disenfranchisement provision aptly illustrates the defects in such laws. In *Doe* v. *Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001), a Maine statute prohibiting individuals under guardianship for reason of "mental illness" from registering to vote or voting failed to pass constitutional muster on due process and equal protection grounds. The court applied strict scrutiny, and found that the State had "disenfranchised a subset of mentally ill citizens based on a stereotype rather than any actual relevant incapacity." *Id.* at 52. The court also found the statute facially unconstitutional under the equal protection clause, because the State's insistence on looking to archaic categories such as "idiotic," "lunatic," and "unsoundness of mind" to determine who was excluded from voting based on mental illness permitted improper classifications and disenfranchised an overbroad class of individuals. *Id.* at 54–55; see also, *e.g.*, *Manhattan State Citizens' Group Inc.* v. *Bass*, 524 F. Supp. 1270 (S.D.N.Y. 1981) (New York statute prohibiting individuals involuntarily committed to mental institution from voting was unconstitutional as applied).

2. States Deny Access To Voting Equipment and Polling Places

States have also discriminated by denying individuals with disabilities physical access to both polling places and voting machines. Although the cases in the area generally have been decided on statutory rather than constitutional grounds, it is hard to imagine a compelling State interest in making it difficult or impossible for people with disabilities to exercise their fundamental right to vote, particularly when necessary modifications often come at a minimal cost. For example, in *National Organization on Disability* v. *Tartaglione*, 2001 WL 1231717 (E.D. Pa. Oct. 11, 2001), a group of plaintiffs with visual and mobility impairments brought suit against, among others, the Secretary

of the Commonwealth of Pennsylvania, because the Secretary could, but had not, approved voting machines that would allow plaintiffs with visual impairments to participate fully in the voting process. See also *American Ass'n of People with Disabilities* v. *Smith*, 227 F. Supp. 2d 1276 (M.D. Fla. 2002) (declining to dismiss a suit against Florida officials where State officials certified machines which did not provide equal access to voters with disabilities); *Hill* v. *New York State Bd. of Elections*, 503 N.Y.S.2d 958 (Sup. Ct. 1986) (State board of elections had continually permitted local entities to locate polling places in sites inaccessible to people with disabilities). Because the States' categorical disenfranchisement of persons with disabilities and interference with such persons' rights to vote are themselves unconstitutional, there is no basis for concluding that the reasonable accommodation requirements of Title II do not represent a congruent and proportional legislative response in such circumstances.

C. Patterns Of State Interference With The Fundamental Right To Marry And Form Families

1. States Sterilize Persons With Disabilities

Every individual enjoys a fundamental right to control his or her ability to procreate "free from unwarranted governmental intrusion." *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972). This Court has also recognized a fundamental right to bodily integrity under the Fourteenth Amendment's due process clause. *Cruzan* v. *Director, Mo. Dep't of Health*, 497 U.S. 261, 269 (1990). Limitations on these fundamental rights are subject to heightened scrutiny. *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 684–686 (1977).

The States share a long and shameful pattern of depriving Americans with disabilities of the right and ability to procreate. Early in the last century, most States had laws authorizing involuntary sterilization of persons with disabilities.[11] Some of those laws were still in force when Con-

11. See generally Phillip R. Reilly, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 45–55 (1991).

gress enacted the ADA, although commentators generally had long concluded that "compulsory sterilization laws, no matter what their rationale, [we]re unconstitutional in the absence of evidence that compulsory sterilization [wa]s the only remedy available to further a compelling governmental interest."[12] In 1991, for instance, an Arkansas court overturned, as violative of due process, a State statute authorizing sterilization of "mentally deficient persons" without provision for notice, right of representation, right of hearing, or judicial oversight of the sterilization decision. *McKinney* v. *McKinney*, 805 S.W.2d 66 (Ark. 1991); see also *Motes* v. *Hall County Dep't of Family & Children Servs.*, 306 S.E.2d 260, 261–262 (Ga. 1983) (Georgia statute authorizing sterilization on "legal preponderance" of evidence did not meet constitutional requirements, because due process requires "'clear and convincing' evidence").[13] In 1981, former patients of Virginia institutions who were involuntarily sterilized under a 1924 statute articulated a continuing constitutional violation, based on the State's continuing failure to *notify* them that they had been involuntarily sterilized—causing them to suffer "medical, emotional, and mental problems, arising in large part from unsuccessful and uninformed attempts to deal with their infertility." *Poe* v. *Lynchburg Training Sch. & Hosp.*, 518 F. Supp. 789, 793 (W.D. Va. 1981).

Even after compulsory sterilization statutes were repealed, some States enacted statutes that allowed sterilization on the consent of the superintendent of a custodial care institution or a guardian.[14] Sterilization on the ba-

12. See *In re A.W.*, 637 P.2d 366, 368–369 (Colo. 1981) (citing Burgdorf & Burgdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995 (1977), and others).

13. Moreover, in the decades immediately before the ADA, State courts still were upholding sterilization statutes, citing the infamous decision in *Buck* v. *Bell*, 274 U.S. 200 (1927). See, *e.g.*, *In re Sterilization of Moore*, 221 S.E.2d 307 (N.C. 1976); *Cook* v. *State*, 495 P.2d 768 (Or. 1972).

14. Price & Burt, *Sterilization, State Action and the Concept of Consent*, 1 LAW & PSYCH. REV. 57 (1978). *E.g.*, MISS. CODE ANN. §§ 41-45-1, 41-45-9 (1999) (sterilization of "insane, idiotic, imbecile or feeble-

sis of the legal fiction of "substituted consent" still involves State action threatening the fundamental right of procreation. Relying on substituted consent, courts have permitted third persons to consent to sterilizations in circumstances in which the facts indicate that no compelling interest was at stake. See, *e.g.*, *Stump* v. *Sparkman*, 435 U.S. 349 (1978) (15-year-old girl with mild retardation sterilized involuntarily after judge approved, *ex parte*, her mother's petition, without notice to the daughter or appointment of a guardian *ad litem*, although the daughter attended public school and had been promoted each year with her class); *Downs* v. *Sawtelle*, 574 F.2d 1, 5 (1st Cir. 1978) (21-year-old woman who was deaf and mute sterilized with consent of her guardian based on doctor's report recommending the operation "'based 90% on this girl's low mentality involving poor judgment and her lack of restraint on sex appetite and its consequences'") (citation omitted).[15] Because such unconsented-to State-approved sterilization is itself a violation of the constitutional rights of the sterilized individual, there is no support for the contention that Title II of the ADA fails the requirements of congruence and proportionality in this context.

2. States Prohibit The Marriage Of People With Disabilities

Marriage is one of the "basic civil rights of man," *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942), so the right to marry has long been considered fundamental, *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). State laws restricting the

minded" person who "by the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted," upon petition of director of State institution after hearing); IND. CODE § 22-1601 (1950).

15. See also, *e.g.*, *In re A.W.*, 637 P.2d at 370 ("[c]onsent by parents to the sterilization of their mentally retarded offspring has a history of abuse which indicates that parents, at least in this limited context, cannot be presumed to have an identity of interest with their children. The inconvenience of caring for the incompetent child coupled with fears of sexual promiscuity or exploitation may lead parents to seek a solution which infringes their offspring's fundamental procreative rights.") (footnotes omitted).

right of a class of persons to marry are unconstitutional unless the State can show a compelling interest. *Zablocki* v. *Redhail*, 434 U.S. 374, 381 (1978).

Nevertheless, numerous State statutes historically and categorically restricted the right of persons with disabilities to marry, without a determination of individual capacity, in a manner that cannot withstand strict scrutiny. Many States maintained such restrictive statutes through the enactment of the ADA.[16] Just five years before Congress enacted Title II, for instance, this Court noted in *City of Cleburne* that it was still a criminal offense in several states for people with mental retardation to marry. 473 U.S. at 463 & n.12.

Some statutes discriminating against the right of persons with disabilities to marry are still on the books. TENN. CODE ANN. § 36-3-109 (2001), for instance, forbids the issuance of a marriage license "when it appears that the applicants or either of them is at the time drunk, insane or an imbecile." See also MISS. CODE ANN. § 93-1-5 (1999) (same); D.C. CODE ANN. § 46-403 (2001) (marriage of "an idiot or of a person adjudged to be a lunatic" is illegal and void). In 1987, Utah declared that marriage with "a person afflicted with acquired immune deficiency syndrome" is "prohibited" and "void." UTAH CODE ANN. § 30-1-2(1) (1987) (declared "void and invalid" on statutory grounds in *T.E.P.* v. *Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993)). Such statutes provide States with the authority to deny marriage licenses to people on the basis of disabilities with-

16. CAL. CIV. CODE § 4201 (1987) ("imbecile"; "insane"); D.C. CODE ANN. § 30-103 (1981) ("idiot"; "lunatic"); IOWA CODE ANN. § 595.3 (1990) ("a mental retardate"; "mentally ill"); MICH. COMP. LAWS § 551.6 (1988) ("feebleminded"; "imbecile"; "insane"); MISS. CODE ANN. § 41-21-45 (1990) (unlawful to cohabit with "feebleminded" female); PA. STAT. ANN. tit. 48, § 1-5 (West 1990) ("weak-minded"; "insane"); R.I. GEN. LAWS § 15-1-5 (1988) ("idiot"; "lunatic"); VT. STAT. ANN. tit. 15, § 514 (1989) ("idiot"; "lunatic"); *id.* tit. 15, § 512 (1989) ("physically incapable"); W. VA. CODE § 48-2-2 (1990) ("insane"; "idiot"; "imbecile") (copies included in Appendix). See Bruce Dennis Sales, et al., DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES 16–20 (Plenum Press 1982) (as of 1980, forty-two States and the District of Columbia had statutes restricting marriage for persons with disabilities).

out any compelling interest or, indeed, any rational basis. Such denials are themselves unconstitutional, and for that reason, the reasonable accommodation requirement of the ADA must be viewed as a congruent and proportional legislative response in such and similar circumstances.

3. States Discriminate Against Parents With Disabilities

The right to raise one's children is protected by the Constitution. *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972). Balanced against this right is the state's interest in the welfare of the child. *Wisconsin* v. *Yoder*, 406 U.S. 205, 233–234 (1972). The Court has repeatedly "recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel* v. *Granville*, 530 U.S. 57, 66 (2000).

Yet, in matters involving the parent-child relationship, States historically have treated parents with mental retardation and mental or physical disabilities quite differently from other parents. "[D]iscrimination begins with the initial decision to intervene, ends in the decision to terminate the relationship, and is manifest in nearly every significant decision along the way."[17] That discrimination often relies on stereotypes, rather than real individual differences in capacities.

Such stereotyping is evident, for example, in State custody determinations involving parents with mental or physical disabilities, even in cases citing the "best interest of the child" standard. In *Bednarski* v. *Bednarski*, 366 N.W.2d 69, 73 (Mich. Ct. App. 1985), a Michigan trial court terminated a deaf woman's custody of her "[t]wo normal children," citing her deafness, forcing the appellate court to reverse. In another example, a trial judge ordered that a blind father—a successful CEO of a computer company—must be accompanied at all times by a "responsible adult" while caring for his daughter, simply because of his disability. *Clark* v. *Madden*, 725 N.E.2d 100, 103 (Ind. Ct. App. 2000) (reversing trial court). In *H.J.B.* v. *P.W.*, 628 So. 2d 753, 756 (Ala. Civ. App. 1993), an Alabama court affirmed a father's loss of custody primarily because he was HIV-positive.[18]

17. Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1227 (1990).

State agencies have also classified children with disabilities as "unadoptable" in violation of their constitutional rights. In *Baby Neal* v. *Casey*, 821 F. Supp. 320 (E.D. Pa. 1993), for instance, the court permitted due process claims to proceed on behalf of two children classified as "unadoptable" by the Philadelphia Department of Human Services, one because he was tested positive for AIDS, the other because he was "handicapped." Again, because the underlying State conduct at issue in each of these cases was itself unconstitutional, there is no plausible basis for concluding that Title II fails to serve as a congruent and proportional legislative response.

D. Patterns Of Unconstitutional State Discrimination In Education

"[E]ducation is perhaps the most important function of state and local governments." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). In view of the importance of the issue, the categorical exclusion of any class of children from the educational system would pose serious equal protection concerns. See *San Antonio Indep. Sch. Dist.* v. *Rodriguez*,

18. See also *In re Interest of T.N.V.*, 855 S.W.2d 102, 103 (Tex. App.—Corpus Christi 1993) (describing trial court's decision to allow HIV-positive father visitation with his daughter only if both father and child remained "fully robed and fully clothed with gloves, sterile gown and face masks" and ordering that "[t]here shall be no 'skin to skin' contact at any time during the visit"); *In re Marriage of R.R.*, 575 S.W.2d 766, 768 (Mo. Ct. App. 1978) (reversing order of trial judge awarding custody to "immoral" and "dishonest" mother because of unsubstantiated fear that the children would be "emotionally damaged because of [the father's] handicap," multiple sclerosis); *In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979) (condemning trial court's conclusion that father was "deemed forever unable to be a good parent simply because he is physically handicapped" because "[l]ike most stereotypes, this is both false and demeaning"); *Adoption of Richardson*, 59 Cal. Rptr. 323, 329–330 (Ct. App. 1967) (reversing trial court refusal to permit a deaf couple to adopt a child; "[t]here can be no doubt that the judge was biased and prejudiced" against the parents "solely because they were deaf-mutes."); *Moye* v. *Moye*, 627 P.2d 799 (Idaho 1981) (epilepsy).

411 U.S. 1, 37 (1973) (distinguishing "absolute denial" of education from inequalities in funding). States nevertheless have historically discriminated against people with disabilities by excluding them from educational opportunities, and this pattern continues to the present day.

Earlier in the last century, a number of States categorically excluded children with disabilities from public education. See, *e.g.*, DEL. CONST. art. 10, § 1 (1975) (establishing free public schools for all children *except* those who were "physically or mentally disabled"). When Congress enacted the Education for All Handicapped Children Act ("EAHCA") in 1975, it compiled an extensive record that States simply did not educate children with disabilities. Based on this record, Congress found that one million children were *"excluded entirely"* from the public school system, and "more than one-half" of the 8 million children with disabilities did not receive appropriate educational services. 20 U.S.C. § 1400(c)(2) (emphasis added).

Judicial decisions confirm Congress' conclusion. In *Pennsylvania Ass'n for Retarded Children* v. *Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972), for instance, students with mental retardation charged that Pennsylvania statutes excluded them from schools. The court found that the plaintiffs had articulated equal protection and due process claims under the rational basis test. See also *Mills* v. *Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (due process violation when defendant excluded students with disabilities from public education). Congress considered these cases and others like them when it enacted the EAHCA. See *Honig* v. *Doe*, 484 U.S. 305, 310 (1988) ("by the time of the EHA's enactment, parents had brought legal challenges to similar exclusionary practices in 27 other States"). Even when unconstitutional statutory schemes were remedied, States continued to violate the equal protection clause by excluding students with disabilities from educational opportunities. See, *e.g.*, *Panitch* v. *Wisconsin*, 444 F. Supp. 320 (E.D. Wis. 1977).

These constitutional violations continued when Congress enacted the ADA, fifteen years later. In fact, Congress relied upon a Civil Rights Commission Report finding that,

notwithstanding the EAHCA, "a great many handicapped children continue to be excluded from the public schools."[19] Congress found, therefore, that States still were discriminating against children with disabilities in the "critical area" of "education." 42 U.S.C. § 12101(a)(3). Unfortunately, instances of unconstitutional State exclusion persist even today. See, *e.g.*, *Robinson* v. *Kansas*, 117 F. Supp. 2d 1124 (D. Kan. 2000) (students with disabilities stated actionable due process and equal protection claims alleging inadequate school funding), aff'd, 295 F.3d 1183 (10th Cir. 2002), cert. denied, 123 S. Ct. 2574 (2003).

E. Patterns Of Unconstitutional State Treatment Of People With Disabilities In Institutions

In enacting the ADA, Congress found continuing State-sponsored discrimination in the "critical" area of "institutionalization," and noted as well pervasive discrimination against people with disabilities through "segregation." See 42 U.S.C. § 12101(a)(3), (5). The record before Congress when it passed Title II was replete with examples of unconstitutional State-sponsored discrimination in both civil and penal institutions. Such discrimination continues today.

1. States Institutionalize People With Disabilities Without Necessity And Treat Them Deplorably While They Are In Civil Institutions

Just eight years before Congress enacted the ADA, this Court decided *Youngberg* v. *Romeo*, 457 U.S. 307, 315–319 (1982), confirming that people in civil institutions are constitutionally entitled to safe conditions, freedom from unnecessary bodily restraints, and the training necessary to assist them in securing those rights. Nonetheless, the States when the ADA was enacted and today have proven resistant to improving the deplorable unconstitutional conditions in some civil institutions.

A case brought by a class of children with mental re-

19. United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 29 (1983) (*"Accommodating the Spectrum"*).

tardation, emotional disturbances, and physical disabilities against the State of Louisiana is a prime example of a State's continuing unconstitutional behavior. In 1976, the plaintiffs established unnecessary physical abuse, neglect, and unnecessary restraint of its wards, and the judge ordered remedial action. *Gary W.* v. *Louisiana*, 437 F. Supp. 1209, 1219, 1213 (E.D. La. 1976). In 1990, *twenty-five years later*, and notwithstanding the judge's efforts "to facilitate, cajole, and even coerce compliance," the State institutions still were unable to prevent outright abuse of patients, or to provide minimally adequate treatment, consistent with constitutional standards. *Gary W.* v. *Louisiana*, 1990 U.S. Dist. LEXIS 1746, at *81 (E.D. La. Feb. 15, 1990).[20]

Other egregious examples abound. A federal judge recently described Alabama's institutions as "essentially warehousing patients in an inhumane environment." *Wyatt ex rel. Rawlins* v. *Rogers*, 985 F. Supp. 1356, 1361–1362 (M.D. Ala. 1997). The same institutions were the subjects of similar findings, of unconstitutional conduct as early as 1971 for "grossly substandard" instances including examples of residents being scalded to death and restrained in a straitjacket for nine years, among others. *Wyatt* v. *Stickney*, 344 F. Supp. 387, 391 (M.D. Ala. 1972), aff'd in relevant part, 503 F.2d 1305 (5th Cir. 1974). The year that Congress passed Title II, the staff at a New York facility for people with mental retardation regularly left the children in their care lying half-naked and unattended in their own urine

20. Just four years ago, the General Accounting Office documented the continuing practice of unnecessary physical restraint among State institutions. GAO, *Mental Health: Improper Restraint or Seclusion Use Places People at Risk* (Sept. 1999), *at* http://www.gao.gov/archive/1999/he99176.pdf. The Department of Justice likewise has settled, with consent orders, several recent egregious cases involving unnecessary physical restraints. See, *e.g.*, Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, DOJ, to The Honorable Thomas J. Vilsack, Governor of Iowa (July 9, 2002), *at* http://www.usdoj.gov/crt/split/documents/ia_findings_wsrc_gsrc.htm (residents in Iowa institution spent an average of 18 hours a month in mechanical restraints, some for as long as 300 hours a month, and many residents were injured by the use of such restraints). Many similar samples are available at http://www.usdoj.gov/crt/split/findsettle.htm.

and feces on cold floors while the staff watched television. *Society for Good Will to Retarded Children* v. *Cuomo*, 745 F. Supp. 879, 879 (E.D.N.Y. 1990).[21]

In addition to treating people with disabilities deplorably while they are in institutions, the States have a long history of institutionalizing people unnecessarily. The Constitution protects individuals from unnecessary confinement in institutions. *O'Connor* v. *Donaldson*, 422 U.S. 563, 574–575 (1975) (if the basis for commitment ceases to exist, continued confinement unconstitutionally deprives the individual of a significant liberty interest).

Historically, the States institutionalized individuals with mental retardation or deafness as a matter of course, based on false stereotypes, the "science" of eugenics, and pure xenophobia. *City of Cleburne*, 473 U.S. at 461–462 (describing a pattern of State-mandated institutionalization that "paralleled the worst excesses of Jim Crow") (Marshall, J., concurring in part and dissenting in part). Although the laws that mandated institutionalization have largely been repealed, there still is ample evidence of unnecessary and unconstitutional civil commitment. Congress was aware of such evidence when it passed the ADA,[22] and the judicial record amply confirms that it exists. For example, in *Clark* v. *Cohen*, 794 F.2d 79, 85–86 (3d

21. See also, *e.g.*, *Halderman* v. *Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1306–1309 (E.D. Pa. 1977) (unconstitutional, deplorable, and hazardous conditions, including widespread inappropriate use of restraints and incidents of direct abuse from staff persons; the walls of the institution were covered in feces and urine and the residents were subject to outbreaks of infectious disease), rev'd on other grounds, 451 U.S. 1 (1980); *Association for Retarded Citizens* v. *Olson*, 561 F. Supp. 473, 476 (D.N.D. 1982) (constitutional violations in North Dakota institutions; drugs were administered casually, often to the wrong individual; residents were regularly left naked in front of other residents; individuals' health worsened rather than improved), aff'd in relevant part, 713 F.2d 1384 (8th Cir. 1983); *Lelsz* v. *Kavanagh*, 673 F. Supp. 828, 844–848 (N.D. Tex. 1987) (systemic understaffing and communications failures led to inappropriate medication and deaths; behavior modification techniques were "state of the art 1950's") (internal quotations omitted).

22. See *Accommodating the Spectrum*, *supra* note 19, at 34 (noting that "segregationist purpose" of institutions continued; institutions still "lack rational admitting criteria," among other defects).

Cir. 1986), the Third Circuit documented a ten-year effort by staff at a Pennsylvania institution to secure the release of a woman with mild retardation. At age fifteen, in 1956, she was labeled as "severely defective" and committed without a hearing. *Id.* at 85. Even after the statute under which she was committed was repealed, and despite her doctors' recommendations that she be released, State officials never reviewed her case. *Ibid.* In the end, Pennsylvania did not dispute that *forty years* of unnecessary institutionalization had deprived the plaintiff of any hope of living the rest of her life without supervised care. *Id.* at 83. The court of appeals found that this conduct violated the plaintiff's substantive due process rights. *Id.* at 87. In *Eric L. ex rel. Schierberl* v. *Bird*, 848 F. Supp. 303 (D.N.H. 1994), the court found that the State violated procedural due process, equal protection, and the ADA when it segregated children with disabilities in institutions which isolated them and denied them services and placement opportunities comparable to those available to children without disabilities.[23]

2. States Ignore The Medical Needs Of Prisoners With Disabilities And Otherwise Violate Their Constitutional Rights

The Eighth Amendment prohibits disproportionate punishments, *Weems* v. *United States*, 217 U.S. 349, 366–367

23. See also *Thomas S.* v. *Morrow*, 781 F.2d 367, 369–373 (4th Cir. 1986) (North Carolina violated constitutional rights of man with mild retardation when it moved him from State hospital to a detox center rather than providing non-residential support services as hospital recommended); *Jackson* v. *Ft. Stanton Hosp. & Training Sch.*, 757 F. Supp. 1243, 1294–1296 (D.N.M. 1990) (New Mexico deprived a class of individuals with developmental disabilities who were unnecessarily committed of substantive due process rights in numerous instances), rev'd in part on other grounds, 964 F.2d 980 (10th Cir. 1992); D. Schein, *At Home Among Strangers* (1989) (describing numerous deaf individuals committed under repealed statutes allowing for commitment solely by reason of deafness or erroneously considered to have mental disabilities; continued commitment had not been reviewed). Unfortunately, the problem of unnecessary institutionalization remains pervasive. See Sharon P. Davis, *A Status Report to the Nation on People with Mental Retardation Waiting for Community Services* (1997), *at* http://www.thearc.org/misc/WaitPage.html.

(1910), and the "unnecessary and wanton infliction of pain," *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion). The Constitution also forbids State prisons to act with deliberate indifference to the medical needs of prisoners with disabilities. *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976).[24] This practice subjects prisoners with disabilities to multiple punishments: in addition to their sentence, they suffer unnecessary pain, loss of dignity, and, in some cases, a shortened lifespan.

At the time Title II was enacted, however, State prisons nevertheless continued to abuse prisoners with disabilities, denying them these fundamental constitutional protections. For example, a Michigan prison routinely forced two paraplegic inmates to sit in their own feces for hours at a time, causing them medical complications. *Parrish* v. *Johnson*, 800 F.2d 600, 602–603 (6th Cir. 1986). Staff habitually refused to relay the prisoners' requests for aid to nurses, and deliberately placed their food trays in inaccessible positions. Moreover, prison officials did nothing to stop a guard who on several occasions assaulted the inmates with a knife and frequently called one inmate a "crippled bastard who should be dead." *Id.* at 603. The State's conduct furthered "[n]o legitimate penological or institutional objective." *Id.* at 605.

In *Kiman* v. *New Hampshire Department of Corrections*, 301 F.3d 13, 25 n.9 (1st Cir. 2002), aff'd, 332 F.3d 29 (1st Cir. 2003) (en banc), for instance, an inmate with Lou Gehrig's Disease sued New Hampshire under the ADA and State laws. 301 F.3d at 14–15. During his confinement, Mr. Kiman gradually lost the ability to control his voluntary muscles. *Id.* at 15. Despite his repeated requests, the State refused to provide him with a cane to walk or a chair to use in the shower; cuffed his hands behind his back rather than in front despite his pleas of pain; refused to move his cell from the third tier despite his inability to climb stairs; and refused to provide him a special toilet, requiring him to rely on the goodwill of his cellmates to engage in personal hy-

24. *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 210 (1998), confirmed that prisoners with disabilities can sue State prisons under Title II for discrimination in the provision of medical services.

giene. *Id.* at 16. The First Circuit held that the complaint fairly could be read to allege a violation of both the Eighth Amendment and equal protection. *Id.* at 24 & 25 n.9. Because the State's refusal to accommodate Mr. Kiman's disability was itself a constitutional violation, the ADA represents a congruent and proportional response as applied to the type of violations alleged in that case. See *id.* at 25 & n.9.

The suffering endured by inmates with disabilities is reaching crisis proportions. Prisoners with disabilities are over-represented in the criminal justice system and are swelling the ranks of penal institutions.[25] A recent class action in California illustrated State-wide systemic and unconstitutional abuse of prisoners with mental disabilities. In *Coleman* v. *Wilson*, 912 F. Supp. 1282, 1305–1323 (E.D. Cal. 1995), the record revealed that California failed to: screen inmates for medical needs; maintain basic medical records and medication policies; maintain adequate and competent staffing; appropriately use mechanical restraints; and prevent inappropriate disciplinary and behavior control measures on prisoners with mental disabilities, including use of isolation and taser guns. *Ibid.* Each one of these practices violated the prisoners' constitutional rights. *Id.* at 1305–1325.[26]

25. See Council of State Governments, *Criminal Justice/Mental Health Consensus Project* (June 2002), *at* http://consensusproject.org; Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* ch. III (Oct. 2003), *at* http://www.hrw.org/reports/2003/usa1003/. Once incarcerated, inmates with disabilities are far more likely to be victimized, exploited, and injured than other inmates. See, *e.g.*, *Ruiz* v. *Estelle*, 503 F. Supp. 1265, 1344 (S.D. Tex. 1980), aff'd in relevant part, 679 F.2d 1115 (5th Cir. 1982).

26. See also, *e.g.*, *Ruiz*, 503 F. Supp. at 1274–1391 (126-page opinion describing Texas' unconstitutional treatment of prisoners with disabilities, including among many other examples routinely denying prescribed treatments for prisoners who use asthmatic inhalers and wheelchairs and disciplining prisoners with mental retardation for infractions of rules they did not understand); *Yarbaugh* v. *Roach*, 736 F. Supp. 318, 320 (D.D.C. 1990) (prisoner with multiple sclerosis was incarcerated for over a year before he was seen by a physician and did not receive assistance in daily activities; as a consequence, he had not showered in over a year and had fallen repeatedly attempting to move from his wheelchair to his bed).

F. Patterns Of Irrational State Segregation Of People With Disabilities From The Community

Even outside the walls of State-run institutions, the States have historically segregated Americans with disabilities from the community at large through discriminatory zoning laws. Such laws lack a rational basis when they treat people with disabilities differently than other groups without justification. *City of Cleburne*, 473 U.S. at 450 (ordinance requiring a group home for people with mental retardation to obtain a special use permit but not requiring other groups to obtain similar permits violated equal protection).

Over the past decades, many individuals with disabilities have moved from institutional settings into more integrated community settings. Unfortunately, States and municipalities reacting to pressure based on stigma and prejudice responded by enacting dispersion laws that prevent the concentration of community residences for individuals with disabilities in one area. *Epicenter, Inc.* v. *City of Steubenville*, 924 F. Supp. 845, 849 (S.D. Ohio 1996) (cities "reacted to the deinstitutionalization movement" like "post-bellum Southern state governments that passed Jim Crow laws").

When Congress enacted Title II, this form of discrimination was extensive, and involved State as well as local/municipal action. In *Larkin* v. *Michigan*, 883 F. Supp. 172 (E.D. Mich. 1994), for instance, the court considered a Michigan law forbidding the licensing of a group home for people with disabilities if the group home was to be located within 1500 feet of another group home. *Id.* Finding that the dispersion requirements placed quotas on the people with disabilities who could live in a residential neighborhood, the court struck the law as without rational basis and thus violative of equal protection guarantees. *Id.* at 179–180;[27] see also *Bangerter* v. *Orem City Corp.*, 46 F.3d 1491,

27. The Sixth Circuit affirmed on statutory grounds without reaching the constitutional issue. 89 F.3d 285 (6th Cir. 1996). Other States have similar dispersion requirements. See, *e.g.*, CONN. GEN. STAT. § 8-3f

1503 n.20 (10th Cir. 1995) (statutory claim involving Utah law mandating that community housing for people with "handicap[s]" provide 24-hour supervision; "if this case had been brought as an equal protection claim, there is no evidence that the zoning restrictions were rationally related to legitimate government concerns and not based on unsubstantiated fears or irrational prejudices"); *Association of Relatives and Friends of AIDS Patients* v. *Regulations and Permits Admin.*, 740 F. Supp. 95, 103–106 (D.P.R. 1990) (finding intentional discrimination against people with AIDS in zoning decision).

CONCLUSION

Congress' specific findings, the materials cited in this brief, and the legislative history detailed in other briefs all provide extensive and compelling evidence that States perpetuated a pattern of unconstitutional discrimination. In view of this long-standing pattern, Congress was acting well within its constitutional authority when it abrogated the States' immunity from suit under Title II. Accordingly, this Court should affirm the judgments below.

Respectfully submitted.

Of Counsel:
Ira A. Burnim
Jennifer Mathis
JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW
1101 Fifteenth St., N.W.
Washington, D.C. 20005
(202) 467-5730

Timothy K. Armstrong*
Elizabeth B. McCallum
Andrew P. Tower
Kristien Carbonez
Thomas Dillickrath
Richard Groseclose
Kristen McAhren
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2402
(202) 783-0800

Counsel for Amici Curiae

* *Counsel of Record*

NOVEMBER 2003

(2001); DEL. CODE ANN. tit. 22, § 309 (2002); VT. STAT. ANN. tit. 24, § 4409(f) (2002).

APPENDIX

THE AMICI ORGANIZATIONS

AARP is a nonpartisan, nonprofit membership organization with more than thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. Countless AARP members with disabilities rely on Title II of the ADA to assure access to public programs and services, including those provided by States and State entities, in a manner free from discrimination. These protections are especially important to AARP members because older persons have a higher incidence of disabilities than other populations.

The American Association on Mental Retardation ("AAMR") is the nation's oldest and largest interdisciplinary organization of professional and other persons who work exclusively in the field of mental retardation. AAMR promotes progressive policies, sound research, effective practices, and human rights for people with intellectual disabilities.

The American Council of the Blind ("ACB") is a national nonprofit, consumer organization of the blind, with seventy affiliates and members in all fifty states. Its mission is to improve the quality of life, equality of opportunity, and independence for all persons who are blind. To that end, ACB seeks to educate policy makers about the needs and capabilities of people who are blind, and to assist individuals and organizations wishing to advocate for programs and policies that meet the needs of people who are blind, or visually impaired. ACB members were very involved in the efforts that led to the passage of the ADA. Therefore, we are very disturbed about the legal challenges to its constitutionality which have been raised in recent years. We are especially concerned that state governments are increasingly taking up the cause of those who would weaken the ADA's effectiveness. We urge this Court to give careful consideration to the implications of such challenges for the rights and welfare of people with disabilities who live and work within those states.

The American Diabetes Association is the nation's leading nonprofit health organization providing diabetes

research, information, and advocacy. Founded in 1940, the Association conducts programs in all 50 states and the District of Columbia, providing services to hundreds of communities across the country. The mission of the organization is to prevent and cure diabetes, and to improve the lives of all people affected by diabetes. To fulfill this mission, the Association funds research, publishes scientific findings, provides information and other services to people with diabetes, their families, health care professionals and the public, and advocates for scientific research and for the rights of people with diabetes.

The American Occupational Therapy Association ("AOTA") is the national professional association of over 40,000 occupational therapists and occupational therapy assistants as well as students of the profession. The AOTA mission is to support the contributions of occupational therapy to health, wellbeing, productivity and quality of life. Occupational therapists provide treatment and intervention for people with physical and mental disabilities to promote full participation in society and maximum achievement of human potential. Occupational therapy can assist individuals with disabilities in identifying work limitations and potential. AOTA advocates on behalf of the profession and the public through support of positive public policy such as that contained in the Americans with Disabilities Act.

The American Psychiatric Association, with approximately 40,000 members, is the Nation's largest organization of physicians specializing in psychiatry. It has participated in numerous cases in this Court, including *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581 (1999). Its members have a strong interest in the constitutionality of the Americans with Disabilities Act as it bars government entities' discrimination against persons with disabilities, including persons with mental illnesses or disabilities.

The Arc of the United States ("The Arc"), through its nearly 900 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and related disabilities and

their families. Since its inception, The Arc has vigorously challenged attitudes and public policy, based on false stereotypes, which have authorized or encouraged segregation of people with mental retardation in virtually all areas of life. The Arc was one of the leaders in framing and supporting passage of the Americans with Disabilities Act.

The Association on Higher Education And Disability ("AHEAD") is a non-profit organization committed to full participation in higher education and equal access to all opportunities for persons with disabilities, including professional licensing and employment. Its membership includes approximately 2,000 institutions including colleges, universities, not-for-profit service providers, and standardized testing organizations, professionals, and college and graduate students planning to enter the field of disability practice. Many of its members are actively engaged in assuring ADA compliance and in providing reasonable accommodations to both students and employees at institutions of higher education and in high-stakes standardized testing. In addition, AHEAD members actively work with students in establishing vocational plans and job readiness. AHEAD publishes numerous resources on the implementation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 by post-secondary educational institutions.

The Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Bazelon Center has engaged in litigation, administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities. Much of the Center's work involves efforts to remedy disability-based discrimination through enforcement of the ADA.

The Alexander Graham Bell Association for the Deaf and Hard of Hearing ("AG Bell") is a non-profit organization with chapters throughout the United States, and has international affiliates throughout the world. AG Bell advocates for spoken language in children and adults. AG Bell is deemed to be the preeminent organization in deafness. AG Bell provides advocacy, resources and leadership

for parents, professionals, and individuals who are deaf or hard of hearing.

The Depression and Bipolar Support Alliance ("DBSA") is the leading patient-directed national organization focusing on the most prevalent mental illnesses—depression and bipolar disorder. Studies indicate that there may be 20 to 35 million persons with depression and 2.5 million to 10 million people with bipolar disorder. DBSA was founded in 1985 and is based in Chicago. DBSA's mission is to improve the lives of people living with mood disorders. This not-for-profit organization fosters an environment of understanding about the impact and management of these life threatening illnesses by providing up-to-date, scientifically based tools and information, written in easy to understand language. DBSA has more than 1,000 peer-run support groups across the country. Assisted by a Scientific Advisory Board, comprised of the leading researchers and clinicians in the field of mood disorders, DBSA supports research to promote more timely diagnosis, to develop more effective and tolerable treatments and to discover a cure. The DBSA organization works to ensure that people living with mood disorders are treated equitably. In that regard, we believe that the Americans With Disabilities Act should be given a strong and vigorous construction, including coverage for the unlawful discriminatory acts of State units of government.

Easter Seals has been providing services that help individuals with disabilities and special needs, and their families, live better lives for more than 80 years. Easter Seals promotes the passage and enforcement of federal legislation, including the ADA, that enables people with disabilities to achieve greater independence. Our primary services—medical rehabilitation, job training and employment, inclusive child care, adult day services, and camping and recreation—benefit more than 1 million individuals and their families each year through one of 450 centers nationwide.

The Epilepsy Foundation® is the sole national, charitable voluntary health organization dedicated to advancing the interests of the more than two million people with

epilepsy and seizure disorders. The term "epilepsy" evokes stereotyped images and fears in others that affect persons with this medical condition in all aspects of life, including the delivery of public services and participation in public programs. Since its inception, the Foundation has worked to dispel the stigma associated with seizures and has supported the development of laws, such as the ADA, that protect individuals from discrimination based on these stereotypes and fears.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national non-profit public interest organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, the transgendered and people with HIV or AIDS through impact litigation, education and public policy work. Founded in 1973, Lambda Legal is the oldest and largest legal organization addressing these concerns. Since 1983, when it filed the nation's first AIDS discrimination case, Lambda Legal has appeared as counsel or *amicus curiae* in scores of cases in state and federal courts on behalf of people living with HIV or with other disabilities.

As The Nation's Voice on Mental Illness, the National Alliance for the Mentally Ill ("NAMI") leads a national grassroots effort to transform America's mental health care system, eliminate stigma, support research, and attain adequate health insurance, housing, rehabilitation, jobs and family support for millions of Americans living with mental illnesses. Since its creation in 1979, NAMI's members have worked tirelessly at national, state and local levels to combat pervasive discrimination against people with mental illnesses that impose barriers to recovery and prevent these individuals from enjoying fundamental rights accorded other Americans.

The National Association for Rights Protection and Advocacy ("NARPA") includes recipients of mental health and developmental disabilities services; lay, professional, and self-advocates; family members; service providers; disability rights attorneys; and teachers at schools of law, social work, and public policy. It is dedicated to promoting the preferred options of people who have been labeled mentally

disabled.

The National Association of Councils on Developmental Disabilities ("NACDD") is a national organization for Developmental Disabilities Councils that advocates and works for change on behalf of people with developmental, as well as other disabilities, and their families. NACDD was established in 2003 to bring together the two organizations that supported Developmental Disabilities ("DD") Councils, CDDC and NADDC. NADDC was established by DD Councils in 1974 to support them in carrying out their mandated responsibilities under the Developmental Disabilities Assistance & Bill of Rights Act, and to be their national voice. Members are nationwide State and Territorial DD Councils. State Councils undertake advocacy, capacity building, and systemic change activities that are consistent with the purpose of the DD Act, that contribute to a coordinated, consumer and family-centered, consumer and family-directed, comprehensive system of community services, individualized supports and other forms of assistance that enable individuals with developmental disabilities to exercise self-determination, be independent, be productive and be integrated and included in all facets of community life.

The National Council on Independent Living ("NCIL") is the oldest cross-disability, national grassroots organization run by and for people with disabilities. NCIL's membership is comprised of centers for independent living, statewide independent living councils, people with disabilities and other disability rights organizations. NCIL's mission is to advance the independent living philosophy and to advocate for the human rights of, and services for, people with disabilities to further their full integration and participation in society.

For over thirty years, the National Health Law Program ("NheLP") has engaged in legal and policy analysis on behalf of low income and working poor people, people with disabilities, the elderly, and children. NheLP has provided legal representation and conducted research and policy analysis on issues affecting the health status and health access of these groups. As such, NheLP has worked with

the ADA, and the program's work and our clients will be significantly affected by the Court's decision in this case.

Established in 1909, the National Mental Health Association, with its more than 340 affiliates, is dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, re-search, and services. NMHA envisions a just, humane and healthy society in which all people are accorded respect, dignity, and the opportunity to achieve their full potential free from stigma and prejudice.

The National Mental Health Consumers' Self-Help Clearinghouse is a national technical assistance center established in 1986. It is run by and for people who are consumers of mental health services and survivors of psychiatric illness (known as consumers/survivors). Its mission is to promote consumer/survivor participation in planning, providing and evaluating mental health and community support services, to provide technical assistance and information to consumers/survivors interested in developing self-help services, and advocating to make traditional services more consumer/survivor-oriented. The Clearinghouse has an interest in helping people with mental illness live to their full potential as active members of the community.

The National Multiple Sclerosis Society is dedicated to ending the devastating effects of multiple sclerosis. The National MS Society is the only national voluntary MS organization that meets the standards of all major agencies that rate nonprofit groups. The Society supports more MS research and serves more people with MS than any national voluntary MS organization in the world. Through its 50-state network of chapters, the Society funds research, furthers education, advocates for people with disabilities, and provides a variety of empowering programs for the third of a million Americans who have MS and their families. The Society believes that every individual has the fundamental right to lead a full, productive life via the support of laws that promote equality of opportunity for all citizens. The ADA has proven to be a major advancement in the public awareness of disability rights and has prompted sub-

stantial improvements in local disability regulations. Our expression of interest and support in the present case reflects our commitment to the right of every American to be free from any discrimination and lack of independence under law.

The Paralyzed Veterans of America ("PVA") is a congressionally chartered veterans service organization founded in 1946 with over 20,000 members, all of whom are veterans of the armed forces with spinal cord injury or dysfunction. PVA has developed a unique expertise on a wide variety of issues involving the special needs of its members and uses that expertise to be the leading advocate for civil rights and opportunities which maximize the independence of our members. Virtually all PVA members use wheelchairs for mobility and have a significant interest in the broadest possible implementation and enforcement of the Americans with Disabilities Act of 1990.

The Tennessee Disability Coalition is an alliance of 42 groups and organizations in Tennessee that have joined to promote the full and equal participation of men, women and children with disabilities in all aspects of life. Our member groups are predominately organizations operated by individuals with disabilities or their families. Member agencies represent people of all ages with a wide range of disabilities. Some are disability specific groups, such as paralyzed veterans, cerebral palsy, autism, the Deaf and hard of hearing. Others are directed across disability, but focus on specific issues such as civil rights, independent living, or employment. The Coalition and its member agencies advocate for public policies that ensure self-determination, independence, empowerment, integration and inclusion of individuals with disabilities in all aspects of society. The issues in the *Lane* case are fundamental to protecting the rights of people with disabilities and are therefore central to the Coalition's mission and that of its member agencies.

United Cerebral Palsy Associations, Inc. ("United Cerebral Palsy") is one of the oldest and largest national health organizations dedicated to improving services for people with disabilities. Founded in 1949, the organization advances the independence, productivity and full citizenship

of people with disabilities through a nationwide network of more than 100 affiliates in 37 States and the District of Columbia. United Cerebral Palsy was one of the major leaders in supporting enactment of the Americans with Disabilities Act and has a strong interest in ensuring its applicability to States.

NON-CURRENT STATUTES CITED IN BRIEF AS EXAMPLES OF STATES IMPOSING RESTRICTIONS ON JURY SERVICE

(Emphasis added throughout.)

ARK. CODE ANN. § 16-31-102 (1987):

Disqualifications.

(a) The following are disqualified to act as grand or petit jurors:

* * *

(2) *Mentally retarded* or *insane* persons;

* * *

(6) *Persons whose senses of hearing or seeing are substantially impaired*;

* * *

1994 Ark. Acts No. 4, § 6:

It is hereby found and determined by the General Assembly that Arkansas Code 16-31-102 disqualifies from acting as a juror any person who is mentally retarded or insane, and any person whose sense of hearing or seeing is substantially impaired; this act eliminates those disqualifications and in their place disqualifies from jury service persons who by reason of a physical or mental disability are unable to render jury services with the exception that no person may be disqualified solely on the basis of loss of hearing or sight; this modification to Arkansas Code 16-31-102 will bring Arkansas law into compliance with federal law; and this act should go into effect immediately in order to allow those persons to begin serving as grand or petit jurors as soon as possible * * * .

NON-CURRENT STATUTES CITED IN BRIEF AS EXAMPLES OF STATES EXCLUDING STUDENTS WITH DISABILITIES FROM PUBLIC EDUCATION

(Emphasis added throughout.)

DEL. CONST. Art. X, § 1 (1999):

Establishment and maintenance of free public schools; attendance.

Section 1. The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, *not physically or mentally disabled*, shall attend the public school, unless educated by other means.

NON-CURRENT STATUTES CITED IN BRIEF AS EXAMPLES OF STATES RESTRICTING RIGHT TO MARRY AND FORM FAMILIES

(Emphasis added throughout.)

IND. CODE § 22-1601 (1950):

Whenever the superintendent of any hospital or other institution of this state, or of any county in this state, which has the care or custody of *insane, feeble-minded or epileptic* persons, shall be of the opinion that it is for the best interests of the patient and of society that any inmate of the institution under his care should be sexually sterilized, such superintendent, if a lawfully licensed physician and surgeon, is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, an operation or treatment of sterilization on any such patient confined in such institution *afflicted with hereditary forms of insanity that are recurrent, epilepsy, or incurable primary or secondary types of feeble-mindedness:* Provided, That

such superintendent shall have first complied with the requirements of this act.

* * *

CAL. CIV. CODE § 4201 (1987):

License; necessity; contents; denial; under age applicants; forms; affidavit.

All persons about to be joined in marriage must first obtain a license therefor, from a county clerk, which license must show all of the following:

* * *

No license shall be granted when either of the parties, applicants therefore, is an *imbecile*, is *insane*, or is, at the time of making the application for the license, under the influence of any intoxicating liquor, or narcotic drug.

D.C. CODE ANN. § 30-103 (1981):

Marriages void from date of decree; age of consent.

The following marriages in said District shall be illegal, and shall be void from the time when their nullity shall be declared by decree, namely: (1) The marriage of an *idiot* or of a person *adjudged to be a lunatic*; * * *

* * *

IOWA CODE ANN. § 595.3 (West 1988):

License.

Previous to the solemnization of any marriage, a license for that purpose must be obtained from the clerk of the district court. Such license must not be granted in any case:

* * *

5. Where either party is *mentally ill or retarded*, a *mental retardate*, or *under guardianship as an incompetent*.

MICH. COMP. LAWS § 551.6 (1990):

Mental or venereal disease; incapacity; validation of white-African marriages; penalty; competency of witness.

* * *

Section 6. No *insane person, idiot, or person who has been afflicted with syphilis or gonorrhea and has not been*

cured of the same, shall be capable of contracting marriage * * * . *No person who has been confined in any public institution or asylum as a feeble-minded, imbecile or insane patient, or who has been adjudged insane, feeble-minded or an imbecile by a court of competent jurisdiction, shall be capable of contracting marriage* without, before the issuance by the county clerk of the license to marry, filing in the office of the county clerk a verified certificate from 2 regularly licensed physicians of this state that such person has been completely cured of such insanity, imbecility or feeblemindedness and that there is no probability that such person will transmit any of such defects or disabilities to the issue of such marriage. *Any person of sound mind who shall intermarry with such insane person or idiot or person who has been so confined as feeble-minded, imbecile or insane patient, or who has been so adjudged insane, feeble-minded or an imbecile*, except upon the filing of certificate as herein provided, with knowledge of the disability of such person, or who shall advise, aid, abet, cause, procure or assist in procuring any such marriage contrary to the provisions of this section, *is guilty of a felony* and on conviction thereof in any court of competent jurisdiction shall be punished by a fine of not more than $1,000.00 or by imprisonment in the state prison not less than 1 year nor more than 5 years, or by both such fine and imprisonment.

MICH. COMP. LAWS § 552.1 (1990):

Invalidity of marriages; relationship of parties, bigamy, insanity, idiocy; legitimacy of issue.

Section 1. All marriages, which are prohibited by law on account of consanguinity or affinity between the parties, or on account of either of them having a wife or husband then living, and all marriages solemnized when either of the parties was *insane* or an *idiot*, shall, if solemnized within this state, be absolutely void. The issue of such marriage shall be deemed legitimate.

* * *

MISS. CODE ANN. § 41-21-45 (1990):

Unlawful to cohabit with feeble-minded.

It *shall be unlawful for any person to cohabit with or attempt sexual intercourse with a female who is feebleminded*, as defined in section 41-19-101, after adjudication of such feeblemindedness.

Anyone convicted of either of these crimes, shall, upon conviction thereof, be punished by a fine of not less than one thousand dollars, or imprisonment of not less than one year in the penitentiary, or by both such fine and imprisonment.

PA. STAT. ANN. tit. 48, § 1-5 (West 1965):

Restrictions on the issue of marriage license.

No license to marry shall be issued by any clerk of the orphans' court.

* * *

(e) If either of the applicants is or has been, within five years preceding the time of the application, *an inmate of an institution for weak-minded, insane, or persons of unsound mind*, unless a judge of the orphans' court shall decide that it is for the best interest of such applicant and the general public to issue the license, and shall authorize the clerk of the orphans' court to issue the license.

R.I. GEN. LAWS § 15-1-5 (1988):

Bigamous marriages void — marriage of lunatics and idiots.

Any marriage when either of the parties thereto, at the time of the marriage, has a former wife or husband living who has not been, by final decree, divorced from such party, and any marriage where either of the parties thereto is *an idiot or a lunatic* at the time of the marriage, shall be absolutely void, and no life estate created by chapter 25 of title 33 shall be assigned to any widow in consequence of the marriage, and the issue of the marriage shall be deemed illegitimate and subject to all the disabilities of illegitimate issue.

VT. STAT. ANN. tit. 15, § 512 (1990):

Voidable marriages — Grounds for annulment generally.

The marriage contract may be annulled when, at the time of marriage, either party had not attained the age of sixteen years or was *an idiot or lunatic* or *physically incapable of entering into the marriage state* or when the consent of either party was obtained by force or fraud.

VT. STAT. ANN. tit. 15, § 514 (1990):

Party an idiot or lunatic.

(a) When a marriage is sought to be annulled on the ground of the *idiocy* of one of the parties, it may be declared void on the complaint of a relative of such idiot at any time during the life of either of the parties.

(b) When a marriage is sought to be annulled on the ground of the *lunacy* of one of the parties, on the complaint of a relative of the lunatic, such marriage may be declared void during the continuance of such lunacy, or after the death of the lunatic in that condition and during the lifetime of the other party to the marriage.

(c) The marriage of a lunatic may be declared void upon the complaint of a lunatic after restoration to reason, but a decree of nullity shall not be pronounced if the parties freely cohabited as husband and wife after the lunatic was restored to sound mind.

(d) If an action is not prosecuted by a relative, the marriage of an idiot or a lunatic may be annulled during the lifetime of both the parties to the marriage, on the complaint of a person admitted by the court to prosecute as the next friend of such idiot or lunatic.

(e) The word "lunatic" as used in sections 511–514 of this title shall extend to persons of unsound mind other than idiots.

W. VA. CODE § 48-2-2 (1990):

For what and when marriages void; affirmation of annulment of marriage.

(a) The following marriages are voidable and shall be void from the time they are so declared by a judgment order of nullity:

* * *

(3) Marriages solemnized when either of the parties:

(A) Was *an insane person, idiot or imbecile*;

Supreme Court, U.S.
FILED
NOV 12 2003
OFFICE OF THE CLERK

(16)

No. 02-1667

IN THE

Supreme Court of the United States

STATE OF TENNESSEE,
Petitioner,

v.

GEORGE LANE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

DENNIS W. ARCHER
Counsel of Record
PAUL R.Q. WOLFSON
DAVID W. BOWKER
JENNIFER M. ROCKOFF
AMERICAN BAR ASSOCIATION
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5215

BEST AVAILABLE COPY

37 pp

QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE COURTS MUST BE ACCESSIBLE TO ALL, INCLUDING INDIVIDUALS WITH DISABILITIES, TO ENSURE THE LEGITIMACY OF AND PUBLIC CONFIDENCE IN THE ADMINISTRATION OF JUSTICE. 5

A. The Judicial System Must Be Accessible to Individuals With Disabilities in Order to Maintain Fairness, Legitimacy, and Public Confidence in the Administration of Justice. 5

1. To be fair, and to be perceived as fair, the judicial system must be accessible to individuals with disabilities with business before the courts. 5

2. To be fair, and to be perceived as fair, the judicial system also must be accessible to individuals with disabilities acting in other capacities, such as judges, jurors, and court personnel. 7

B. The Lack of Equal and Effective Access to the Judicial System for Persons with Disabilities Harms Not Only Those Persons, But Also the Courts, Which Are Deprived of the Benefits of These Individuals' Participation and Contributions. 9

TABLE OF CONTENTS—Continued

Page

II. PERSONS WITH DISABILITIES HISTORICALLY HAVE FACED AND CONTINUE TO FACE EXCLUSION FROM STATES' JUDICIAL PROGRAMS, SERVICES, AND ACTIVITIES. 10

A. Before Enactment Of The ADA, States Denied Persons With Disabilities Access To Judicial Programs, Services, And Activities. 10

B. Access To Judicial Programs, Services, And Activities Remains Inadequate Or Nonexistent For Many Individuals With Disabilities. 12

III. TITLE II OF THE ADA IS ESSENTIAL TO ENSURING THAT INDIVIDUALS WITH DISABILITIES HAVE EQUAL AND EFFECTIVE ACCESS TO THE JUDICIAL SYSTEM. 16

A. The Right Of Equal And Effective Access To The Courts Is A Core Aspect Of Constitutional Guarantees And Is Essential To Ensuring The Proper Administration Of Justice. 16

B. Because Fundamental Rights Are At Stake When Access To The Judicial System Is Denied, More Than A Rational Basis Is Necessary To Justify Exclusion. 19

C. Under Any Level Of Scrutiny, The Denial Of Meaningful Access To The Courts For Individuals With Disabilities Who Are Capable, With Or Without Reasonable Accommodations, Should Be Impermissible Under The Fourteenth Amendment. 21

TABLE OF CONTENTS—Continued

Page

D. Title II Of The ADA's Requirement Of Affirmative Conduct On The Part Of States Is Essential To Ensuring That Individuals With Disabilities Obtain Real, Not Merely Theoretical, Access To The Judicial System. 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Page(s)

Alexander v. *Choate*, 469 U.S. 287 (1985) 24
Ballard v. *United States*, 329 U.S. 187 (1946) 8
Batson v. *Kentucky*, 476 U.S. 79 (1986) 9
Board of Trustees v. *Garrett*, 531 U.S. 356 (2001) 10, 19, 22
Boddie v. *Connecticut*, 401 U.S. 371 (1971) ..... *passim*
Bothwell v. *Republic Tobacco Co.*, 912 F. Supp. 1221 (D. Neb. 1995) 6
Bounds v. *Smith*, 430 U.S. 817 (1977) 17
Burns v. *Ohio*, 360 U.S. 252 (1959) 18, 22
California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508 (1972) 16
Carter v. *Jury Commission*, 396 U.S. 320 (1970) 8
Chambers v. *Baltimore & Ohio Railroad Co.*, 207 U.S. 142 (1907) 6, 16
DeLong v. *Brumbaugh*, 703 F. Supp. 399 (W.D. Pa. 1989) 11
Eckstein v. *Kirby*, 452 F. Supp. 1235 (E.D. Ark. 1978) 11
Faretta v. *California*, 422 U.S. 806 (1975) 6
Gall v. *Commonwealth*, 702 S.W.2d 37 (Ky. 1985) 12
Galloway v. *Superior Court*, 816 F. Supp. 12 (D.D.C. 1993) 11
Globe Newspaper v. *Superior Court*, 457 U.S. 596 (1982) 19
Griffin v. *Illinois*, 351 U.S. 12 (1956) 16, 18
Heller v. *Doe*, 509 U.S. 312 (1993) 20
Hill v. *Shelby County*, 599 F. Supp. 303 (N.D. Ala. 1984) 11
Jenness v. *Fortson*, 403 U.S. 431 (1971) 25
Kroll v. *St. Charles County*, 766 F. Supp. 744 (E.D. Mo. 1991) 11
Lewinson v. *Crews*, 282 N.Y.S.2d 83 (App. Div. 1967), *aff'd*, 236 N.E.2d 853 (N.Y. 1968) 12
Little v. *Streater*, 452 U.S. 1 (1972) 18, 20

TABLE OF AUTHORITIES—Continued

Page(s)

M.L.B. v. *S.L.J.*, 519 U.S. 102 (1996) 18, 20
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 20
Mayer v. *Chicago*, 404 U.S. 189 (1971) 22
McCray v. *New York*, 461 U.S. 961 (1983 9
People v. *Aguilar*, 677 P.2d 1198 (Cal. 1984) 18
Personnel Administrator v. *Feeney*, 442 U.S. 256 (1979) 23
Powers v. *Ohio*, 499 U.S. 400 (1991) 8
Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980) 16, 17, 19, 20
Rinaldi v. *Yeager*, 384 U.S. 305 (1966) 18
San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973) 20
State v. *Spivey*, 700 S.W.2d 812 (Mo. 1985) 12
Talamini v. *Allstate Insurance Co.*, 470 U.S. 1067 (1985) 6
Taylor v. *Louisiana*, 419 U.S. 522 (1975) 8, 9
United States ex rel. Negron v. *New York*, 434 F.2d 386 (2d Cir. 1970) 18
Wolff v. *McDonnell*, 418 U.S. 539 (1974) 17

STATUTES

Americans with Disabilities Act of 1990
42 U.S.C. §§ 12101 *et seq.* 2
42 U.S.C. § 12101(a)(7) 5

LEGISLATIVE MATERIALS

2 Staff of the House Committee on Education and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans With Disabilities Act*, 100th Cong., 2d Sess. (Comm. Print 1990) 10

ARTICLES

Edwards, Hon. Harry T., *Race and the Judiciary*, 20 Yale L. & Pol'y Rev. 325 (2002) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Jones, Maryann, *And Access for All: Accommodating Individuals with Disabilities in the California Courts*, 32 U.S.F. L. Rev. 75 (1997) 13
Loth, Renee, *State Auditor Criticizes Courthouse Conditions*, Boston Globe, Feb. 16, 1990, at 100 11
O'Connor, Hon. Sandra Day, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217 (1992) 9

MISCELLANEOUS

American Bar Association, *ABA Policy and Procedures Handbook* (2002) 2
American Bar Association Committee on Legal Problems of the Elderly and the Committee on Mental & Physical Disability Law *Recommendation, Report No. 115* (Aug. 1991) 3
American Bar Association Committee on Mental & Physical Disability Law *Recommendation, Report No. 112* (Feb. 2002) 3
American Bar Association Goals, *available at* http://www.abanet.org/about/goals.html (last visited Nov. 6, 2003) 2
American Bar Association Section on Individual Rights & Responsibilities and the Young Lawyers Division, *Recommendation, Report No. 128* (Aug. 1989) 2
Attorney General's Commission on Disability, *Final Report* (Dec. 1989) 11
Brief of the American Bar Association as Amicus Curiae Supporting Respondents, in *Grutter* v. *Bollinger*, 123 S. Ct. 2325 (2003) 7
Complaint in *Curtin* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Dec. 19, 2002) 14, 15

TABLE OF AUTHORITIES—Continued

Page(s)

Complaint in *Dia Xiong* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Mar. 6, 2003) 14
Complaint in *Fietek* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Jan. 17, 2003) 14
Complaint in *Losing* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Feb. 18, 2003) 14
Complaint in *Vatne* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Mar. 6, 2003) 14
Complaint in *Zacharias* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Apr. 3, 2002) 14
Consent Decree and Order, *Salmond* v. *County of Teton*, No. CV-97-130-GF-LBE (D. Mont. 2000) 15
DOJ Status Report on Enforcing the ADA, Jan.-Mar. 2003, available at http://www.usdoj.gov/crt/ada/statrpt.htm 15
Enforcing the ADA: A Status Report from the Department of Justice, available at http://www.usdoj.gov/crt/enforce.htm#anchor2010570 (last visited Nov. 6, 2003). 12
Findings of Fact and Conclusions of Law, *Armstrong* v. *Davis*, C94-2307 (N.D. Cal. Dec. 22, 1999) 13
Governor's Committee on Disability Issues and Employment: Civil and Legal Rights Subcommittee, *Interim Court and Courthouse Access Project* (Sept. 5, 2000) 13

TABLE OF AUTHORITIES—Continued

Page(s)

Judicial Council of California, Subcommittee on Access for Persons with Disabilities, *Access to the California State Courts: A Survey of Court Users, Attorneys and Court Personnel* (Jan. 1997), *available at* http://www.courtinfo.ca.gov/programs/access/documents/dis_surv.pdf (last visited Nov. 6, 2003) 13

Letter from Michael J. Swanson, Esq., to Deborah L. Cochelin, Chair of the Court Improvement Committee of the Washington State Bar Ass'n, re "Court Improvement Committee WSBA" (Sept. 3, 1998) 13

New York State Commission on Quality of Care for the Mentally Disabled & the New York State Bar Ass'n Committee on Mental and Physical Disability, *Survey of Access to New York State Courts for Individuals with Disabilities* (Feb. 1994) 14

Settlement Agreement Between the United States of America and the County of Essex, New Jersey, DOJ # 204-48-78 (Dec. 9, 2002) 15

Settlement Agreement Under the Americans with Disabilities Act, *No Barriers, Inc.* v. *Cornelius*, Civ. No. 3:97CV-2330-R (N.D. Tex. Feb. 2002) 15

Speech by Hon. Sandra Day O'Connor to the Ninth Circuit Judicial Conference (Aug. 6, 1992), in *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. Cal. L. Rev. 745 (1994) 6

Supreme Court of Minnesota, *Notice To Deaf Community* (Aug. 12, 2003) 15

Texas Civil Rights Project, *Courts Closed to Justice: A Survey of Courthouse Accessibility in Texas for People with Disabilities* (Nov. 1996) 14

TABLE OF AUTHORITIES—Continued

Page(s)

U.S. Census Bureau, *Disability Status: 2000, available at* http://www.census.gov/hhes/www/disable/disabstat2k/disabstat2ktxt.html (last visited Oct. 10, 2003) 5

U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983) 11

In the Supreme Court of the United States

No. 02-1667

STATE OF TENNESSEE,
Petitioner,

v.

GEORGE LANE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE AMICUS CURIAE[1]

The American Bar Association ("ABA"), with more than 405,000 members, is the leading national membership organization of the legal profession. Its mission "is to be the national representative of the legal profession, serving the

[1] This brief has not been authored in whole or in part by counsel for a party and no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Petitioner and respondents have consented to the filing of this brief.

Neither this brief, nor the decision to file it, should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

public and the profession by promoting justice, professional excellence and respect for law."[2]

The ABA has a particularly strong interest in ensuring that all persons, including individuals with disabilities, enjoy equal and effective access to federal, state, and local courts. The official goals of the ABA include promoting "full and equal participation in the legal profession by minorities, women, and persons with disabilities."[3] Many ABA members who have disabilities[4] have a direct interest in the continued viability of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* ("ADA"), as a measure to ensure equal and effective access to the services, programs, and activities of state and local governments, especially their judicial systems.

The ABA has a long history of advocacy in support of the full participation of individuals with disabilities in the legal system.[5] In 1989, the ABA resolved to support "federal legislation which prohibits discrimination on the basis of disabilities."[6] In 1991, the ABA adopted a policy that calls for affirmative conduct on the part of local judicial districts to create a judicial system that is "barrier-free" to individu-

[2] American Bar Association, *ABA Policy and Procedures Handbook* 1 (2002).

[3] ABA Goal IX; *see also* ABA Goal I (to promote improvements in the American justice system), and ABA Goal II (to promote meaningful access to the American justice system for all persons), *available at* http://www.abanet.org/about/goals.html (last visited Nov. 6, 2003).

[4] More than 1,500 ABA members have returned questionnaires to the ABA stating that they have one or more disabilities.

[5] Since 1945, the ABA has had a standing committee or commission dedicated to the rights of individuals with disabilities. For years, the ABA has supported initiatives to ensure access to public buildings and transportation for people with physical disabilities, and since 1976, it has published what is now called the Mental and Physical Disability Law Reporter, the most exhaustive periodical available on disability law.

[6] ABA Section on Individual Rights & Responsibilities and the Young Lawyers Division, *Recommendation, Report No. 128* (Aug. 1989).

als with disabilities.[7] In 2002, the ABA adopted a resolution specifically urging "all federal, state, territorial, and municipal courts to help ensure equal access to justice by making courthouses and court proceedings accessible to individuals with disabilities, including lawyers, judges, jurors, litigants, court employees, witnesses, and observers."[8] The resolution recommends that courts make reasonable accommodations to "meet the needs of the individual, including, where appropriate, removal of architectural barriers, modification of rules and practices, and provision of auxiliary aids and services."[9] In light of the ABA's nationwide membership and its longstanding commitment to the cause of equal access to justice for individuals with disabilities, the ABA has a special perspective to provide and a strong interest in the matter before the Court.

SUMMARY OF ARGUMENT

This case raises issues central to the ABA's mission of promoting meaningful access to the American system of justice for all persons. The issues in this case are also fundamental to the American conception of a system of justice, for the Constitution guarantees to all persons the right of access to the judicial system.

The courts—as guardians of individual rights—have a special responsibility to protect and enforce the right of equal access to the judicial system because this right is the baseline for all other rights. First and foremost, the courts must ensure that their doors remain open to all individuals. In the case of individuals with disabilities, this obligation means providing accommodations and removing barriers

[7] ABA Committee on Legal Problems of the Elderly and the Committee on Mental & Physical Disability Law, *Recommendation, Report No. 115* (Aug. 1991).

[8] ABA Committee on Mental & Physical Disability Law, *Recommendation, Report No. 112* (Feb. 2002).

[9] *Id.*

that otherwise have the effect of excluding people with disabilities from the judicial system. In short, the courts must be a model of accessibility.

That courts be barrier free—and thus open to all—is vital to the legitimacy of and public confidence in the administration of justice. A lack of equal access to the courts harms not only those persons who are excluded, but also the system itself, which is deprived of the benefits of their inclusion. In addition, the exclusion from the justice system of any segment of society undermines public confidence in the system. It therefore is imperative that the courts ensure that individuals with disabilities are not excluded from participation in any capacity—as litigants, witnesses, attorneys, judges, jurors, courthouse staff, or observers.

Despite the importance of such access to the judicial system, however, individuals with disabilities continue to face the effects of discrimination in state courts and state judicial services and activities. Although the Americans with Disabilities Act of 1990 ("ADA") has significantly reduced barriers to the justice system encountered by individuals with disabilities, such individuals continue to be excluded from state judicial systems throughout the nation because of the failures of state courts to remove barriers to those individuals' participation. Countless lawsuits and enforcement actions continue to demonstrate that, in 2003, access to state courts still is anything but equal for individuals with disabilities.

In light of the barriers that still exist, Title II of the ADA remains essential to ensuring continued improvement in equal and effective access to the courts for individuals with disabilities because it requires the States to act affirmatively to ensure the accomplishment of that goal. Enforcement of Title II, in turn, is essential to ensuring that the right of access to the States' courts is real—and not merely theoretical—for individuals with disabilities.

ARGUMENT

I. THE COURTS MUST BE ACCESSIBLE TO ALL, INCLUDING INDIVIDUALS WITH DISABILITIES, TO ENSURE THE LEGITIMACY OF AND PUBLIC CONFIDENCE IN THE ADMINISTRATION OF JUSTICE.

More than 49,700,000 Americans—roughly one in five of the 257,200,000 million people in the United States age five or older—have mental or physical disabilities or other long lasting impairments. U.S. Census Bureau, *Disability Status: 2000*, *available at* http://www.census.gov/hhes/www/disable/disabstat2k/disabstat2ktxt.html (last visited Nov. 10, 2003). Prior to the enactment of the ADA, these individuals faced the discriminatory effects of "restrictions and limitations, . . . purposeful unequal treatment, and . . . political powerlessness in our society." 42 U.S.C. § 12101(a)(7). Although there have been incremental improvements in the way individuals with disabilities are treated since the ADA's enactment in 1990, individuals with disabilities continue to encounter architectural, communication, and attitudinal barriers to vital public services, programs, and activities including most notably courts of law and the judicial system as a whole.

A. The Judicial System Must Be Accessible To Individuals With Disabilities In Order To Maintain Fairness, Legitimacy, And Public Confidence In The Administration Of Justice.

Public confidence in the judicial system rests largely upon courts' ability to advance—and to be seen as advancing—fairness, justice, and equal treatment before the law. In order to achieve these goals, the courts must afford all individuals, including those with disabilities, the right and opportunity to participate fully in the justice system.

1. To be fair, and to be perceived as fair, the judicial system must be accessible to individuals with disabilities with business before the courts.

That all individuals should enjoy equal access to the courts is a basic tenet of our democratic society. It is en-

shrined in our Constitution and recognized by this Court. *See, e.g.*, *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975) (holding that the Due Process Clause guarantees an accused the right to be present at all stages of trial); *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971) (except in extraordinary circumstances, all civil litigants must be afforded a meaningful opportunity to be heard); *Chambers* v. *Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). Justice Stevens thus stated:

> *Freedom of access to the courts is a cherished value in our democratic society....* The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help. There is, and should be, the strongest presumption of open access to all levels of the judicial system.... *This Court, above all, should uphold the principle of open access.*

Talamini v. *Allstate Ins. Co.*, 470 U.S. 1067, 1070-1071 (1985) (Stevens, J., concurring) (footnotes omitted) (emphasis added).

Unreasonable exclusion of individuals from the proceedings and activities of courts undermines the legitimacy of the courts and decreases public trust in the judicial system as a whole. *See, e.g.*, Speech by Hon. Sandra Day O'Connor to the Ninth Circuit Judicial Conference (Aug. 6, 1992), in *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. Cal. L. Rev. 745, 760 (1994) ("When people perceive gender bias in a legal system, whether they suffer from it or not, they lose respect for that system, as well as for the law."); *Bothwell* v. *Republic Tobacco Co.*, 912 F. Supp. 1221, 1230 (D. Neb. 1995) ("[T]he reduction of governmental resources to provide legal services to the poor is, for them, a removal of the civil justice system's accessibility (and thus, its legitimacy)."). To be perceived as fair, courts at a minimum must open their doors to individual litigants and defendants, including those who require accommodations for disabilities.

2. To be fair, and to be perceived as fair, the judicial system also must be accessible to individuals with disabilities acting in other capacities, such as judges, jurors, and court personnel.

The rights of individuals with disabilities to have equal access to the courts and to participate in the administration of justice are consistent with our democratic heritage and critical to public confidence in the administration of justice. Only by increasing the participation of individuals from traditionally disadvantaged communities as judges, jurors, and court employees can we hope to increase the legitimacy of and respect for the courts and the judicial system as a whole within these communities. *See, e.g.*, Brief of the American Bar Association as Amicus Curiae Supporting Respondents, at 10, 19, in *Grutter* v. *Bollinger*, 123 S. Ct. 2325 (2003) ("The compelling public interest in minority participation in the institutions of our democratic government is beyond dispute. ... Without effective participation by all segments of society, the legitimacy of our legal system will be imperiled. Our nation's founders recognized that a legitimate government depends upon the participation of all the people.") (citation omitted).

Conversely, exclusion of individuals based upon a characteristic such as race or disability generates distrust and a lack of public confidence in the judicial system. *See, e.g.*, *id.* at 19-22. For this reason, the Court long has held that juries must be drawn from a representative cross-section of the community:

> Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.

Taylor v. *Louisiana*, 419 U.S. 522, 530-531 (1975) (citing *Thiel* v. *Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)); *see also Powers* v. *Ohio*, 499 U.S. 400, 406-407 (1991); *Carter* v. *Jury Comm'n*, 396 U.S. 320, 330 (1970).

Similarly, in *Ballard* v. *United States*, 329 U.S. 187, 195 (1946), this Court reversed a conviction on the ground that the "purposeful and systematic exclusion of women from the [jury] panel" violates the fundamental tenet that one's fitness to participate in the judicial system must rest on an individualized determination based upon competence, rather than a generalized group determination based upon presumed common characteristics. This Court stated:

> '[P]rospective jurors shall be selected by court officials without systematic and intentional exclusion of any . . . groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.'

Ballard, 329 U.S. at 192-193 (quoting *Thiel*, 328 U.S. at 220).

Although this Court's decisions regarding access to and participation in the judicial system have dealt primarily with race and gender, the principles underlying those decisions apply with equal force in the case of individuals with disabilities. Just as equal access must be available to individuals without regard to their race or gender, so too must it be available to individuals without regard to their physical abilities or disabilities, so long as they are competent to serve or participate, given reasonable accommodations.

B. The Lack Of Equal And Effective Access To The Judicial System For Persons With Disabilities Harms Not Only Those Persons, But Also The Courts, Which Are Deprived Of The Benefits Of These Individuals' Participation And Contributions.

The arbitrary exclusion of any minority or traditionally disadvantaged group, including individuals with disabilities, does as much harm to the judicial system as to the individuals who are excluded.[10] In Justice Marshall's words, "[t]he effect of excluding minorities goes beyond the individual defendant, for such exclusion produces injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *McCray* v. *New York*, 461 U.S. 961, 968 (1983) (dissenting from denial of certiorari) (internal quotation marks omitted); *see also Batson* v. *Kentucky*, 476 U.S. 79, 87 (1986); *Ballard*, 329 U.S. at 195.

Common sense, as well as historical experience, strongly suggests that participation by a diverse group of individuals is beneficial to the administration of justice. *See, e.g.*, Hon. Harry T. Edwards, *Race and the Judiciary*, 20 Yale L. & Pol'y Rev. 325, 329 (2002) ("[R]acial diversity on the bench can enhance judicial decision making by broadening the variety of voices and perspectives in the deliberative process."); *cf.* Hon. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1217 (1992) ("Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding [his colleagues] to respond not only to the persua-

---

[10] The exclusion of individuals with disabilities harms not only the excluded individual and the judicial system at large, but also the rights of other participants, including, for example, criminal defendants who have a Sixth Amendment right to be tried not only by a fair "cross section of the community," *Taylor*, 419 U.S. at 526, but also "by a jury whose members are selected pursuant to nondiscriminatory criteria," *Batson*, 476 U.S. at 85-86 (citations omitted).

siveness of legal argument but also to the power of moral truth."). To exclude individuals with disabilities from the courtroom is thus not only to deny individual litigants their right but also to deprive the bench or jury of viewpoints or ideas that may be unique to individuals who have experienced life with a disability or disabilities.

II. Persons With Disabilities Historically Have Faced And Continue To Face Exclusion From States' Judicial Programs, Services, And Activities.

A. Before Enactment Of The ADA, States Denied Persons With Disabilities Access To Judicial Programs, Services, And Activities.

Title II of the ADA was enacted against the background of a history and pattern of discrimination by the States against the disabled in which "[t]he courthouse door" was literally "still closed to Americans with disabilities." 2 Staff of the House Comm. on Educ. and Labor, 101st Congress, 2d Sess., *Legis. Hist. of Pub. L. No. 101-336: The Americans With Disabilities Act*, 100th Cong., 2d Sess. 936 (Comm. Print 1990) (Sen. Harkin). The legislative record of the ADA contains numerous references to state failure to make courts and courthouses accessible to individuals with disabilities. In one notable instance, a witness at a congressional hearing testified that she "went to the courtroom one day and . . . could not get into the building because there were about 500 steps to get in there." *Id.* at 1070-1071 (Emeka Nwojke). And as Justice Breyer noted in his dissent in *Board of Trustees* v. *Garrett*, 531 U.S. 356, 377-382 (2001), the legislative record of the ADA sets forth numerous other instances of States' failures to make courthouses accessible—including failures to provide interpreter services for people who are deaf, to accord adult victims of abuse with developmental disabilities their equal right to testify in court, to provide amplified sound systems in courtrooms, to install access ramps and curb cuts in courthouse areas, and to enable an

individual using a wheelchair to obtain a marriage license when the courthouse was not wheelchair accessible.

This evidence in the legislative record is confirmed by reports documenting States' failures to make courthouses accessible. A 1989 survey conducted by the Attorney General's Commission on Disability for the State of California found that "[m]any court rooms, jail visiting rooms and jails have architectural barriers that make them inaccessible to people who use wheelchairs."[11] In Massachusetts in 1990, 60% of the State's 97 courthouses were found to lack ramps or accessible toilets.[12] A comprehensive report issued by the United States Commission on Civil Rights in 1983 describes the types of discrimination that people with disabilities have encountered nationwide, including the per se "[d]isqualification of many handicapped persons from jury service" and the "[a]bsence of accommodations to permit handicapped persons to serve as jurors."[13]

---

[11] Attorney General's Comm'n on Disability, *Final Report* 102 ¶ c (Dec. 1989).

[12] Renee Loth, *State Auditor Criticizes Courthouse Conditions*, Boston Globe, Feb. 16, 1990, at 100; *see also Kroll* v. *St. Charles County*, 766 F. Supp. 744 (E.D. Mo. 1991) (holding Missouri county in contempt for failing to make courthouse accessible despite 1989 consent decree requiring structural changes).

[13] *See, e.g.*, U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 168 (1983). Those who were able to gain physical access to the courthouse nonetheless often were flatly excluded from jury service. Before the ADA, blanket exclusion of blind persons, deaf persons, and individuals with mobility difficulties was routine. *See Galloway* v. *Superior Court*, 816 F. Supp. 12, 16 (D.D.C. 1993) (enjoining, in 1993, the Superior Court of the District of Columbia from excluding all blind persons from jury service); *DeLong* v. *Brumbaugh*, 703 F. Supp. 399 (W.D. Pa. 1989) (finding violative of the Rehabilitation Act the exclusion of individual who is deaf and who reported for jury service accompanied by ASL interpreter); *Hill* v. *Shelby County*, 599 F. Supp. 303 (N.D. Ala. 1984) (concerning exclusion of persons with disabilities from jury service, including exclusion of the individual because he could not reach second floor courtroom); *Eckstein* v. *Kirby*, 452 F. Supp. 1235, 1243 (E.D. Ark. 1978) (ruling that "[i]mpairment of the senses, particularly the senses of

B. Access To Judicial Programs, Services, And Activities Remains Inadequate Or Nonexistent For Many Individuals With Disabilities.

Since 1990, as localities have begun to comply with Title II of the ADA, courthouse and courtroom access has improved, but lack of access to courthouses and courtrooms remains a serious problem for individuals with disabilities in many communities. Virtually every quarterly status report issued since 1994 by the U.S. Department of Justice regarding ADA enforcement identifies numerous cases and settlements involving States' failures to provide adequate access to judicial services for persons with disabilities.[14]

---

sight and hearing, vitiates a person's ability to serve effectively as a juror"); *Gall* v. *Commonwealth*, 702 S.W.2d 37 (Ky. 1985) (noting that persons with disabilities were excluded from lists for jury service); *Lewinson* v. *Crews*, 282 N.Y.S.2d 83 (App. Div. 1967) (excluding a blind college professor from serving as a juror by applying a New York law that excludes from jury service any individual "not in possession of his natural faculties" or otherwise "infirm and decrepit"), *aff'd*, 236 N.E.2d 853 (N.Y. 1968); *State* v. *Spivey*, 700 S.W.2d 812, 813 (Mo. 1985) (rejecting the argument that exclusion of individual who is deaf from jury service violated constitutional rights of defendant who is deaf on ground that "public interest" supported exclusion).

[14] Just in 2001, for example, (1) a small Ohio city agreed to make its courtroom accessible; (2) Ben Hill County, Georgia, reached an agreement with the Department of Justice to install an accessible ramp, construct accessible toilet rooms, and install an elevator to the second floor, within nine months of settlement; (3) a California county small claims court agreed to modify its courthouse for people with mobility impairments and reschedule cases to accessible locations when requested; (4) an Iowa district court and a South Carolina court agreed to provide sign language interpreter services; (5) Saguache County, Colorado, agreed to make physical modifications to its entrances and restrooms and install an elevator to provide access to services on the second and third floors; (6) a county superior court judge agreed to provide an individual who is deaf with a real time court reporter at a civil trial and to train all court judges on the requirements of the ADA; (7) an Arkansas county agreed to install an elevator so that individuals with disabilities could gain access to the third floor courtroom; and (8) a New York town agreed to remodel its town hall to make accessible the courthouse and clerk's offices housed within the building. *See Enforcing the ADA: A Status Report from the Department of Justice, available at* http://www.usdoj.gov/crt/enforce.htm #anchor2010570 (last visited Nov. 6, 2003).

A 1997 survey by the Access for Persons with Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee listed an array of failures in accommodations for individuals with disabilities in the California state court system.[15] In seven public hearings conducted by Subcommittee on Access for Persons with Disabilities of the Judicial Council Access and Fairness Advisory Committee, 59% of the 148 speakers testified to problems with physical access to California courts.[16]

In a report on the issue of access to courts and courthouses in the State of Washington, a subcommittee of the Governor's Committee on Disability Issues and Employment noted that approximately 20 courts (nearly 20% of those responding to its questionnaire) identified access problems under the ADA and other failures to comply with the ADA.[17]

---

[15] Judicial Council of California, Subcomm. on Access for Persons with Disabilities, *Access to the California State Courts: A Survey of Court Users, Attorneys and Court Personnel* (Jan. 1997), *available at* http://www.courtinfo.ca.gov/programs/access/documents/dis_surv.pdf (last visited Nov. 6, 2003); *see also* Maryann Jones, *And Access for All: Accommodating Individuals with Disabilities in the California Courts*, 32 U.S.F. L. Rev. 75, 88-97 (1997).

[16] The lack of suitable access also affects parole hearings. For example, in a California class action suit for injunctive relief under Title II of the ADA and the Rehabilitation Act of 1973, the district court found that "[s]ome prisoners who use wheelchairs have had to crawl up stairs to get to their hearings; mentally retarded prisoners who cannot even spell their names have waived their right to hearings and have spent years in prison without the benefit of any assistance; a blind witness was denied access to information at his hearings because he could not see the documents; and hearing impaired prisoners who normally express themselves by using sign language had their hands shackled at their hearings making such communication impossible." Findings of Fact and Conclusions of Law, *Armstrong* v. *Davis*, C94-2307 CW, at 5:10-19 (N.D. Cal. filed Dec. 22, 1999).

[17] Governor's Committee on Disability Issues and Employment: Civil and Legal Rights Subcommittee, *Interim Court and Courthouse Access Project* 3 (Sept. 5, 2000); *see also* Letter from Michael J. Swanson,

A 1996 survey of Texas state courts conducted by the Texas Civil Rights Project found the "accessibility of courtrooms for jurors, litigants, members of the public, and attorneys with disabilities [to be] abysmal and unjustifiable."[18] The New York State Commission on Quality of Care for the Mentally Disabled found that only 8% of all courtrooms were fully accessible, more than 80% of the state courts had no assistive listening systems or TDDs available, and 65% of the courts did not provide accessible parking spaces.[19]

Since April 2002, at least seven individuals who are deaf have filed suit against the Minnesota state court system for its failure to provide interpreter services, or for providing unqualified interpreters, for the individuals' court appearances.[20] One of the plaintiffs alleged that he went to the courthouse *seven times* to resolve a traffic ticket dispute, and each time the court failed to provide an interpreter or

---

Esq., to Deborah L. Cochelin, Chair of the Court Improvement Committee of the Washington State Bar Ass'n, re "Court Improvement Committee WSBA" (Sept. 3, 1998) (detailing accessibility problems in several courthouses throughout the state, including, for example, the lack of ramps and elevators at the Garfield County Courthouse where sheriff deputies, if available, had to carry individuals who use wheelchairs into the courthouse and up the stairs).

[18] Texas Civil Rights Project, *Courts Closed to Justice: A Survey of Courthouse Accessibility in Texas for People with Disabilities* 4 (Nov. 1996).

[19] New York State Comm'n on Quality of Care for the Mentally Disabled & the New York State Bar Ass'n Comm. on Mental & Physical Disability, *Survey of Access to New York State Courts for Individuals with Disabilities* 13 (Feb. 1994).

[20] *See Zacharias* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Apr. 3, 2002); *Dia Xiong* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Mar. 6, 2003); *Losing* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Feb. 18, 2003); *Fietek* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Jan. 17, 2003); *Curtin* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Dec. 19, 2002); *Vatne* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Mar. 6, 2003).

provided one who did not know how to sign legal terms and concepts.[21] All seven cases arose after the Minnesota court system purportedly had "[taken] steps" in 2002 to resolve its "difficulties with providing sign language interpreter services in the period from November 2001 to May 2002."[22]

As these examples clearly illustrate, thirteen years after passage of the ADA, many court systems remain seriously in default on even their most basic obligations under the law. The ADA therefore remains essential to efforts to ensure that States and localities do not deprive persons with disabilities of access to the justice system.

---

[21] *Curtin* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Dec. 19, 2002).

[22] *See* Supreme Court of Minn., *Notice To Deaf Community* (Aug. 12, 2003); *see also* Settlement Agreement Under the Americans with Disabilities Act, *No Barriers, Inc.* v. *Cornelius*, Civ. No. 3:97CV-2330-R ¶ 4 (N.D. Tex. Feb. 2002) (agreeing to correct all violations so that each facility would be accessible to and usable by individuals with disabilities, including individuals in wheelchairs); Consent Decree and Order, *Salmond* v. *County of Teton*, No. CV-97-130-GF-LBE (D. Mont. 2000) (involving enforcement action to obtain accessible entrance and elevators or other means to reach upper floors of courthouse); Settlement Agreement Between the United States of America and the County of Essex, New Jersey, DOJ # 204-48-78 (Dec. 9, 2002) (agreeing to improve access through structural improvements, including providing accessible parking, elevators, and courtroom seating). Numerous other cases and settlements are listed in the *DOJ Status Report on Enforcing the ADA, Jan.-Mar. 2003, available at* http://www.usdoj.gov/crt/ada/janmar03.htm (last visited Nov. 10, 2003), including: *United States* v. *Massachusetts* (involving inaccessibility of courtrooms and offices located up flights of stairs in buildings without ramps or elevators); settlement in Lucas County, Ohio (involving inaccessibility of courthouses for individual with impaired mobility); settlement in Ohio (involving county probate and juvenile court in Ohio that did not provide qualified sign language interpreters); settlement in Texas county (involving sheriff's department that did not use sign language interpreter to communicate with parent of juvenile being questioned); settlement (involving failure to provide assistive device to hard of hearing defendant); settlement in Mississippi (involving court's failure to provide a sign language interpreter to defendant who is deaf).

III. Title II Of The ADA Is Essential To Ensuring That Individuals With Disabilities Have Equal And Effective Access To The Judicial System.

This Court has found a right of access inherent in numerous constitutional provisions, including the Due Process Clauses, the Privileges and Immunities Clause of Article IV, and the First Amendment.[23] Moreover, the Court has made clear that this right of access is a right of *equal* access. *See Griffin* v. *Illinois*, 351 U.S. 12, 16 (1956) (plurality opinion). Persons with disabilities are entitled to the benefit of this right of access no less than any other persons. Title II of the ADA is a constitutionally appropriate implementation of that constitutional guarantee.

A. The Right Of Equal And Effective Access To The Courts Is A Core Aspect Of Constitutional Guarantees And Is Essential To Ensuring The Proper Administration Of Justice.

This Court has articulated at least four distinct ways in which the Constitution protects a right of access to the courts. First, under the First Amendment, the public has the right to attend and observe judicial proceedings. *See Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980) (opinion of Burger, C.J.). Openness to all the public, which this Court has called "one of the essential qualities of a court of justice," *id.* at 567 (citation omitted), ensures that the judicial system is perceived to be fair and deserving of public confidence. "[T]he means used to achieve justice must have

[23] *See Boddie*, 401 U.S. at 377 (Due Process Clause "requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard"); *Chambers*, 207 U.S. at 148 ("[t]he right to sue and defend in the courts is . . . one of the highest and most essential [Art. IV] privileges of citizenship"); *California Motor Transp. Co.* v. *Trucking Unltd.*, 404 U.S. 508, 510 (1972) (right to petition gives rise to a right of access to the justice system).

the support derived from public acceptance of both the process and its results." *Id.* at 571.

Second, the Due Process Clause secures the right to initiate proceedings in court to seek judicial relief from unlawful treatment at the hands of the government. This issue has arisen most frequently in the context of prisoner access to the courts, but this Court has recognized that the right of prisoner access is simply one part of a more general "right of access to the courts, . . . [which] is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff* v. *McDonnell*, 418 U.S. 539, 579 (1974); *see also Bounds* v. *Smith*, 430 U.S. 817, 821-822 (1977).

Third, the Due Process Clause prevents the States from obstructing any individual's "[r]esort to the judicial process" when that process is central to "interests of basic importance in our society." *Boddie*, 401 U.S. at 376. In *Boddie*, the Court invalidated a requirement that litigants pay filing fees and costs, when that requirement effectively prevented indigent persons from bringing an action for divorce. *See id.* at 374. In finding that access to the courts was a central aspect of due process, the Court explained the central role of the courts in securing individuals' rights and duties:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. . . . It is to the courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement.

Id. at 374-375.

Finally, when important interests are at stake in judicial proceedings, the Due Process Clause requires more than a theoretical right of access to the courts; it requires *meaningful* access. "[P]ersons forced to settle their claims of right

and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie*, 401 U.S. at 377. To ensure meaningful access, particularly when an individual faces the prospect of coercive State deprivation through the judicial process of life, liberty, or property, due process often requires the State to give a litigant affirmative assistance so that he may participate in the proceedings if he effectively would be unable to participate otherwise. *See M.L.B.* v. *S.L.J.*, 519 U.S. 102, 125 (1996); *id.* at 128-129 (Kennedy, J., concurring in the judgment). Even when due process does not obligate the State to establish an avenue of judicial redress (such as an appeal), once the State does so, "these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966).

Thus, the State may not insist on court fees and costs when to do so would prevent an indigent person from defending against a "devastatingly adverse action" in court, such as a possible deprivation of parental rights or loss of liberty. *See M.L.B.*, 519 U.S. at 125; *Burns* v. *Ohio*, 360 U.S. 252 (1959); *Griffin*, 351 U.S. 12. Similarly, when an indigent man is confronted with a paternity action and cannot pay for blood tests that would dispel a presumption that he is the father, due process requires the State to shoulder the cost of the tests. *See Little* v. *Streater*, 452 U.S. 1, 14-15 (1972). And it has long been understood that, as a matter of due process, the State must provide assistance, such as an interpreter, to one who could not otherwise understand the proceedings in his criminal trial. *See United States ex rel. Negron* v. *New York*, 434 F.2d 386, 389-390 (2d Cir. 1970); *People* v. *Aguilar*, 677 P.2d 1198, 1203-1204 (Cal. 1984).

The principle that the State must provide equal access to the courts is equally applicable to persons with disabilities. A person with a disability who faces the loss of his freedom, children, or property in a judicial proceeding similarly must have meaningful access to the courts. He cannot be said to enjoy equal and effective access to the courts unless he can actually attend, follow, and participate in the

proceeding. Meaningful, not merely theoretical, access to the courts is required by the Constitution. If someone who uses a wheelchair cannot even enter the courtroom where his liberty is at stake, he has no more access to justice than does the indigent person who cannot pursue an appeal because he lacks the funds for the filing fee.

B. Because Fundamental Rights Are At Stake When Access To The Judicial System Is Denied, More Than A Rational Basis Is Necessary To Justify Exclusion.

In *Board of Trustees* v. *Garrett*, where this Court held that States may not be made subject to private suits for money damages under Title I of the ADA, the Court emphasized that that case involved only claims of discrimination in employment of persons with disabilities. 531 U.S. 356 (2001). The employment context was crucial in *Garrett* because employment decisions by governmental entities ordinarily do not implicate any kind of heightened scrutiny. Had the plaintiffs in *Garrett* sought to pursue employment discrimination claims against Alabama state entities under the Equal Protection Clause, they would have faced the hurdle that "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational." *Id.* at 367.

Title II of the ADA is quite different, however, because it often implicates constitutionally protected rights—e.g., the right to vote, the right to marry, the right to raise one's children, the right to be free from cruel and unusual punishment, and, as in this case, the right of access to the courts—that are entitled to greater protection than the rational basis test provides. First, as noted above, the First Amendment right to attend judicial proceedings is a protected right for all members of the public that may not be restricted absent an "overriding consideration." *Richmond Newspapers*, 448 U.S. at 564; *Globe Newspaper* v. *Superior Court*, 457 U.S. 596 (1982). Although there may be practical limitations, such as space and expense, that might limit the number of

attendees a court can accommodate, *see Richmond Newspapers*, 448 U.S. at 581 n.18, this Court never has suggested that mere administrative inconvenience or even budgetary considerations would be sufficient to deny a member of the public the right to enter a courthouse and attend a proceeding there.

Second, this Court's numerous other right-of-access cases discussed above are solidly grounded in the Due Process Clause (although they also may rely upon the Equal Protection Clause) and frequently rely upon the Court's balancing approach in decisions such as *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). Notably, these due process decisions do not exhibit the deference to the State that is characteristic of rational basis decisions such as *Heller* v. *Doe*, 509 U.S. 312 (1993). To the contrary, as the Court explained in *M.L.B.*, when an individual faces the deprivation of a cherished right through the state machinery of justice, that individual's interest in securing equal and effective access to the courts often outweighs state concerns about inconvenience and cost. *See* 519 U.S. at 124-125; *id.* at 129 (Kennedy, J., concurring in the judgment); *see also Little*, 452 U.S. at 16-17 (relying on *Mathews* test to conclude that "the State's monetary interest is hardly significant enough to overcome private interests as important as those here") (internal quotation marks and citation omitted). Thus, a State may be required to offer financial assistance to one seeking to pursue judicial proceedings; at a minimum, the State may not deny access to those proceedings to one who is unable to pay the State's customary court fees, *id.*, even though the State has no *general* obligation to ensure that the burdens and benefits of government do not fall unequally based upon the relative wealth of its citizens, *see San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 51-54 (1973).

Third, due process may require the State to make accommodations or exceptions for particular individuals in order to safeguard their right of access to the courts, even if the State's general rule would be rational and constitutionally valid as applied to most other individuals. Thus, in *Bod-*

die, the Court held that the State's requirement of payment of costs for a divorce action implicated the "right to a meaningful opportunity to be heard within the limits of practicality," which "must be protected against denial by particular laws that operate to jeopardize it for particular individuals." 401 U.S. at 379-380. The Court made clear that even a "generally valid" approach or procedure "may fail to satisfy due process because of the circumstances" of a particular litigant if it "operates to foreclose [that] particular party's opportunity to be heard." *Id.*

These decisions make clear that a rational basis such as administrative convenience or cost concerns will not justify the State's failure to ensure within reason that persons with disabilities are able to enter courthouses, attend judicial proceedings, or participate fully in matters to which they are parties.

C. Under Any Level Of Scrutiny, The Denial Of Meaningful Access To The Courts For Individuals With Disabilities Who Are Capable, With Or Without Reasonable Accommodations, Should Be Impermissible Under The Fourteenth Amendment.

Although denying persons with disabilities meaningful access to the judicial system requires application of a more rigorous standard of review than a "rational basis," this Court need not decide this case on that particular ground, for this Court's precedents also establish the principle that denying persons with disabilities meaningful access to the courts fails any standard of review and therefore is impermissible under the Fourteenth Amendment.

That the "rational basis" test cannot justify a State's effectively excluding persons from the justice system altogether has been made clear in this Court's precedents involving access to the courts for indigent persons. In those cases, this Court has held that a State's refusal to open the courthouse door to persons who cannot pay an otherwise generally applicable filing fee is irrational and invidious and

therefore violative of the Fourteenth Amendment. For example, in *Mayer* v. *Chicago*, 404 U.S. 189 (1971), this Court invalidated an Illinois Supreme Court practice under which only indigent persons convicted of felony offenses, and not indigent persons convicted of nonfelony offenses, could obtain free transcripts of their criminal trials for their appeals. Although the State argued that it had legitimate interests in saving money and in not burdening the court system with appeals in minor cases, this Court held that "[t]he invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The State's fiscal interest is, therefore, irrelevant." *Id.* at 197.

Similarly, in *Burns* v. *Ohio*, 360 U.S. 252 (1959), this Court invalidated an Ohio Supreme Court practice under which indigent persons had no opportunity to file a petition for discretionary leave to appeal to the Ohio Supreme Court without prepayment of filing fees (after having had review in an intermediate appellate court). Stressing that the Ohio Supreme Court had "effectively foreclosed access to the second phase of [criminal appeals] solely because of [individuals'] indigency," this Court found "no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants." *Id.* at 257.

A central feature of these decisions is that there is no suggestion that either the Illinois or the Ohio Supreme Court was attempting to bar the door to indigent persons' appeals *because* they were indigent. That is, the practices did not result from a "bare desire . . . to harm a politically unpopular group," or "negative attitudes" toward indigent people. *Cf. Garrett*, 531 U.S. at 381. Moreover, these practices of denying assistance to indigent persons were not intentional exclusions, but the result of a failure to take notice of the needs of particular litigants. The Court found that these practices were "irrational" and "invidious," however, because they effectively excluded indigent persons from the avenues of justice.

So too here, a State that effectively denies persons with disabilities access to its court system by failing to accommodate the unique needs of each individual engages in invidious and irrational practices in violation of the Fourteenth Amendment. No "rational basis" can justify a State's ignoring the fully foreseeable fact that persons who (for example) use wheelchairs or have hearing impairments or are blind frequently have business in our nation's courts and courthouses and can neither enter the building nor understand the proceedings without reasonable accommodations.

D. Title II Of The ADA's Requirement Of Affirmative Conduct On The Part Of States Is Essential To Ensuring That Individuals With Disabilities Obtain Real, Not Merely Theoretical, Access To The Judicial System.

Under the Equal Protection Clause, it is normally sufficient if a State does *not* take cognizance of the status of any of its individual citizens. A violation of equal protection is ordinarily established only when the decision-maker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 279 (1979). Thus, the evenhanded application of a formally neutral law usually will satisfy equal protection principles.

But as this Court's access cases make clear, the requirement of equal treatment is not satisfied where the obvious result is the denial of an individual's due process rights. Rather, a different analysis is required when the State attempts to deprive an individual of his liberty and that individual cannot meaningfully participate in judicial proceedings without reasonable accommodations where appropriate, such as the removal of architectural barriers, modification of rules and practices, or provision of auxiliary aids and services. Just as a non-English-speaking individual is denied due process when proceedings against him are conducted in a language he cannot understand with no provision for making them intelligible to him, and just as an in-

digent individual is denied due process if he lacks the means to pursue an appeal from his criminal conviction with no provision for assistance, a person with a disability is denied due process if the State fails to provide him with any accommodation and thereby effectively denies him meaningful access to the courts. As the Court explained in *Boddie*, "[t]he State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due." 401 U.S. at 380. Thus, due process may require affirmative conduct on the part of the State to ensure that individuals with disabilities can participate meaningfully in judicial proceedings.

This Court has recognized this very point in its prior disability cases. For example, in a case involving Section 504 of the Rehabilitation Act of 1973, on which Title II of the ADA was modeled, this Court noted that "a refusal to modify an existing program," even if neutrally framed, "might become unreasonable and discriminatory." *Alexander* v. *Choate*, 469 U.S. 287, 300 (1985) (internal quotation marks omitted). "[A]n otherwise qualified handicapped individual must be provided with meaningful access .... The benefit itself, of course, cannot be denied in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to ensure meaningful access, reasonable accommodations in the ... program or benefit may have to be made." *Id.* at 301.

There are numerous situations in which individuals with disabilities may be deprived of meaningful access to the judicial system, and therefore denied due process, because of a State's failure to act affirmatively to make reasonable accommodations. As dramatically illustrated by the present case, a State cannot plausibly be said to afford an individual due process in judicial proceedings if that individual cannot even enter the courthouse where his liberty is at stake. Similarly, sign language interpreters, Computer Aided Real-Time Transcription services (for persons who are deaf and do not understand sign language), "induction loop" systems

in courtrooms (for individuals who use hearing aids), Braille signage, and other accommodations may be necessary to ensure that individuals with disabilities can participate meaningfully in judicial proceedings. In such circumstances, it is no answer for the State to excuse its failure to provide lifts, sign language interpreters, Braille documents, and other accommodations by saying that it formally treats all individuals alike. As countless examples have shown, "the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971).

* * * * *

States' persistent and continuing failure to provide equal and effective access to the judicial system for individuals with disabilities should itself be constitutionally impermissible. By providing in Title II of the ADA a legal remedy against such violations, Congress has acted appropriately to enforce the guarantees of the Fourteenth Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

DENNIS W. ARCHER
Counsel of Record
PAUL R.Q. WOLFSON
DAVID W. BOWKER
JENNIFER M. ROCKOFF
AMERICAN BAR ASSOCIATION
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5215

NOVEMBER 2003

17

No. 02-1667

Supreme Court, U.S.
FILED
NOV 12 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

GEORGE LANE, BEVERLY JONES,
and UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND THE ANTI-DEFAMATION LEAGUE IN SUPPORT OF RESPONDENTS

BARBARA R. ARNWINE
THOMAS J. HENDERSON
MICHAEL L. FOREMAN
KRISTIN M. DADEY
THE LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, N.W.
Suite 400
Washington, DC 20005
(202) 662-8600

CHARLES LESTER, JR.
Counsel of Record
TERESA WYNN ROSEBOROUGH
DEBORAH M. DANZIG
JENNIFER N. IDE
ANDREW W. BROY
NICOLE D. LAWSON
SUTHERLAND ASBILL
& BRENNAN LLP
999 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 853-8000

Counsel for Amici Curiae
(Other counsel listed on inside cover)

43 pp

VINCENT A. ENG
THE NATIONAL ASIAN PACIFIC
AMERICAN LEGAL CONSORTIUM
1140 CONNECTICUT AVENUE, N.W.
Suite 1200
Washington, DC 20036
(202) 296-2300

DENNIS C. HAYES
General Counsel
THE NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE
4805 Mt. Hope Drive
Baltimore, MD 21215-3297
(410) 580-5777

FOSTER MAER
THE PUERTO RICAN LEGAL
DEFENSE AND EDUCATION FUND
99 Hudson Street, 14th Floor
New York, NY 10013

ELLIOT MINCBERG
DEBORAH LIU
PEOPLE FOR THE AMERICAN
WAY FOUNDATION
2000 M Street, N.W., Suite 400
Washington, DC 20036
(202) 467-4999

ABBEY GANS
MICHAEL LIEBERMAN
THE ANTI-DEFAMATION LEAGUE
823 United Nations Plaza
New York, NY 10017
(212) 885-5885

QUESTION PRESENTED

Whether Congress validly abrogated states' Eleventh Amendment immunity to enable private individuals to bring damages suits to protect the exercise of fundamental constitutional rights by individuals with disabilities and to insure to these individuals the equal protection of the law under Title II of the American with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 (2002).

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Interest of Amici Curiae	1
Statement of the Case	3
Summary of Argument	4
Argument	7
I. Title II Of The ADA Guarantees The Fundamental Rights And Liberties Of Individuals With Disabilities.	7
II. For Legislation Intended To Protect Against Constitutional Violations Invoking Heightened Scrutiny, Courts Should Apply The Rational Means Test Enunciated In *M'Culloch v. Maryland*.	12
III. Even Under The Analysis Set Forth In *Garrett*, Title II Is Appropriate Legislation Under § 5 Of The Fourteenth Amendment.	14

Contents

	Page
A. Title II Is Intended to Guarantee Individuals with Disabilities Equal Opportunity to Obtain Vital Services and to Exercise Fundamental Rights and Liberties.	15
B. Congress Supported Title II With Specific Findings Concerning the Pervasiveness of State Discrimination Against Individuals with Disabilities in the Provision of Programs and Services.	16
C. The Substantive and Remedial Provisions of Title II are Proportional and Congruent to the Rights Protected by the Legislation.	20
IV. The Rigorous Standard Of Review Recently Applied To § 5 Legislation Unduly Compromises Congressional Power.	23
Conclusion	30

TABLE OF CITED AUTHORITIES

CASES

	Page
Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001)	1
Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001)	*passim*
Brown & Williamson v. F.T.C., 710 F.2d 1165 (CA6 1983)	10
Burroughs v. United States, 290 U.S. 534 (1934)	29
City of Boerne v. Flores, 521 U.S. 507 (1997)	*passim*
Duncan v. Louisiana, 391 U.S. 145 (1968)	7
Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975)	27
Faretta v. California, 422 U.S. 806 (1975)	9
FCC v. Beach Communications, 508 U.S. 307 (1993)	24
Field v. Clark, 143 U.S. 649 (1892)	27
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)	28
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)	29

	Page
Gravel v. United States, 408 U.S. 606 (1972)	27
Harper v. Virginia Board of Elections, 383 U.S. 663 (1966)	5, 8
Helminski v. Ayerst Laboratoriess, 766 F.2d 208 (CA6 1985)	10
Katzenbach v. Morgan, 384 U.S. 641 (1966)	5
Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)	*passim*
Lopez v. Monterey County, 525 U.S. 266 (1999)	1
M'Culloch v. Maryland, 4 Wheat, 17 U.S. 316 (1819)	*passim*
Medical Bd. Of California v. Hason, 537 U.S. 1028 (2002), *cert. dismissed*, 123 S. Ct. 1779 (2003)	1
Nevada Department of Human Resources v. Hibbs, 123 S. Ct. 1972 (2003)	*passim*
Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)	10
Olmstead v. Zimring, 527 U.S. 581 (1999)	8, 21
Popovich v. Cuyahoga County Court, 276 F.3d 808 (CA6 2002), *cert. denied*, 537 U.S. 812 (2002)	4, 21-22

Page

Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) 10

Reynolds v. Sims, 377 U.S. 533 (1964) 10

Romer v. Evans, 517 U.S. 620 (1996) 15

Seminole Tribe v. Florida, 517 U.S. 44 (1996) 14

Shapiro v. Thompson, 394 U.S. 618 (1969) 8

Skinner v. Oklahoma, 316 U.S. 535 (1942) 8

Stanley v. Illinois, 405 U.S. 645 (1972) 8

Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) 10

United States v. Ballin, 144 U.S.1 (1892) 27

United States v. Carolene Products Co., 304 U.S. 144 (1938) 29

United States v. Morrison, 529 U.S. 598 (2000) ... 12

Ex parte Virginia, 100 U.S. 339 (1879) 29

Waller v. Georgia, 467 U.S. 39 (1984) 9

Zablocki v. Redhail, 434 U.S. 374 (1978) 8

Page

UNITED STATES CONSTITUTION

art. I, § 5, cls. 2, 3 26-27

art. I, § 6, cl. 1 27

First Amendment 7, 10

Fourth Amendment 7

Fifth Amendment 7

Sixth Amendment 7, 9

Eighth Amendment 7

Eleventh Amendment ..... *passim*

Fourteenth Amendment ..... *passim*

Fifteenth Amendment 8

STATUTES

42 U.S.C. § 12101(a)(2) 17

42 U.S.C. § 12101(a)(3) 7, 16, 17

42 U.S.C. § 12101(a)(5) 16, 17

	Page
42 U.S.C. §§ 12101(a)(5)-(9)	16
42 U.S.C. § 12101(a)(6)	17
42 U.S.C. § 12101(a)(7)	17
42 U.S.C. § 12101(a)(8)	17
42 U.S.C. § 12101(a)(9)	17
42 U.S.C. § 12131-12165	i
42 U.S.C. § 12131	1
42 U.S.C. § 12131, *et seq*	3
42 U.S.C. § 12131(2)	21
42 U.S.C. § 12132	1, 7, 13
42 U.S.C. § 12202	14
Tenn. Code Ann. § 8-50-103	19

Page

LEGISLATIVE MATERIALS

135 Cong. Rec. 8,712 (1989) 18

H.R. Rep. No. 101-485 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267 ..... 17, 18, 19

S. Rep. No. 101-116 (1989) ..... *passim*

2 Staff of the House Comm. Of Educ. and Labor, 101st Cong., 2d Sess., Legis. Hist. Of Pub. L. No. 101-336: *The Americans with Disabilities Act*, 100th Cong., 2d Sess. 936 (Comm. Print 1990) 8

Oversight Hearing on H.R. 4498, *Americans with Disabilities Act: Hearing Before the Subcomm. On Select Educ. Of the House Comm. On Educ. & Labor*, 100th Cong., 2d Sess. 40-41 (1998) 9, 18

ADMINISTRATIVE MATERIALS

28 C.F.R. § 35.130(b)(7) 13, 21

28 C.F.R. § 35.150(a) 21

28 C.F.R. § 35.150(a)(2) 21

28 C.F.R. § 35.150(a)(3) 21

28 C.F.R. § 35.164 21

Page

OTHER AUTHORITIES

Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 Cornell L. Rev. 328 (2001) 26, 27

Nat'l Council on Disability, *Tennessee v. Lane: The Legal Issues and the Implications for People with Disabilities* (2003), *at* http://www.ncd.gov/newsroom/publications/legalissues.html 22

Philip P. Frickey & Steven S. Smith, *Judicial Review, The Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 Yale L.J. 1707 (2002) 25, 26

John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States 93* (2002) 24

Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel*, 110 Yale L.J. 441 (2000) 28

INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee"), the National Asian Pacific American Legal Consortium ("NAPALC"), the National Association for the Advancement of Colored People ("NAACP"), the Puerto Rican Legal Defense and Education Fund ("PRLDEF"), People For the American Way Foundation ("People For"), and the Anti-Defamation League ("ADL") submit this Brief as *amici curiae* with the consent of the Parties,[1] in support of Respondents' argument that 42 U.S.C. §§ 12131-12132, Title II of the Americans With Disabilities Act, was validly enacted pursuant to the power of Congress under § 5 of the Fourteenth Amendment.

The Lawyers' Committee was formed in 1963 at the request of President Kennedy to involve private attorneys in the effort to insure the civil rights of all Americans. The Lawyers' Committee has been involved as *amicus curiae* or counsel in several cases before the Court involving the scope of Congress' legislative power. *See, e.g., Nevada Dep't of Human Res.* v. *Hibbs*, 123 S. Ct. 1972 (2003); *Medical Bd. of California* v. *Hason*, 537 U.S. 1028 (2002), *cert. dismissed*, 123 S. Ct. 1779 (2003); *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103 (2001); *Lopez* v. *Monterey County*, 525 U.S. 266 (1999).

NAPALC is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. NAPALC and its affiliates have a long-standing

---

1. Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their staff, or their counsel made monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

interest in addressing matters of discrimination that have an impact on the Asian American community, and this interest has resulted in NAPALC's participation in a number of amicus briefs before the courts.

The NAACP is a non-profit membership corporation that traces its roots to 1909 and was chartered by the State of New York. The NAACP supports the rights guaranteed by the Fourteenth Amendment and Congress's power under § 5 of that Amendment to pass legislation that in certain circumstances abrogates the state sovereignty immunity.

PRLDEF is a national non-profit civil rights organization founded in 1972, dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and policy advocacy. Since its inception, PRLDEF has participated both as direct counsel and as *amicus curiae* in numerous cases throughout the country concerning the proper interpretation of the civil rights laws.

People For is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. People For has supported the Americans with Disabilities Act of 1990, and joins this brief to help vindicate Congress's power under § 5 of the Fourteenth Amendment and its ability to protect individuals with disabilities against discrimination by states and state agencies.

ADL was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. ADL has filed amicus briefs in this Court cases defending government enactments designed to prevent or punish discrimination and hate. ADL has supported Congress's broad authority under the

Fourteenth Amendment to remedy constitutional deprivations caused by States, and Congress's authority to abrogate state sovereign immunity in cases of clear civil rights violations.

The Court's interpretation of the scope of Congress's power to enforce the Fourteenth Amendment through its § 5 powers will directly impact the communities represented by this *amici*. Therefore, *amici* present their views on this extremely important issue.

STATEMENT OF THE CASE

George Lane and Beverly Jones are individuals with paraplegia. Both were unable to participate in court proceedings in the State of Tennessee because the State failed to make its courts accessible to individuals with disabilities. Pet. App. 13, 19. Respondent George Lane was denied access to the General Sessions Court of Polk County. After refusing to crawl up the stairs of the courthouse and declining to be carried by a Sheriff's deputy to reach the second floor courtroom where misdemeanor charges against him were pending, Lane was arrested for failure to appear and taken to jail. Pet. App. 15. Respondent Beverly Jones, a certified court reporter, also was denied access to courthouses in the State of Tennessee. Pet. App. 19-20. Jones' income is dependent on her ability to participate in court proceedings; however, Jones was unable to participate in court proceedings in several Tennessee counties because the courthouses in those counties were inaccessible to individuals with disabilities. *Id.*

Respondents filed separate actions for money damages that were consolidated into this action under Title II of the Americans with Disabilities Act of 1990 ("ADA"), as amended, 42 U.S.C. § 12131, *et seq.* ("Title II"). Petitioner moved to

dismiss on grounds of sovereign immunity under the Eleventh Amendment, but the District Court denied this motion. Pet. App. 6-7. The State of Tennessee subsequently filed an interlocutory appeal. While the appeal was pending, the Sixth Circuit issued its decision in *Popovich* v. *Cuyahoga County Court*, 276 F.3d 808 (CA6 2002), *cert. denied*, 537 U.S. 812 (2002). The *Popovich* court held that Congress validly abrogated states' sovereign immunity by enacting Title II to the extent due process violations were at issue. Applying *Popovich*, the appellate court affirmed the district court's denial of the State of Tennessee's motion to dismiss. On rehearing, the court of appeals affirmed the denial of the motion to dismiss. Pet. App. 5. Thereafter, this Court granted Petitioner's request for a writ of certiorari.

SUMMARY OF ARGUMENT

Pursuant to its power to enforce § 5 of the Fourteenth Amendment, Congress purposefully abrogated the states' Eleventh Amendment immunity when it enacted Title II. Congress recognized and sought to address the pervasive and widespread violations of the due process and equal protection rights of individuals with disabilities by the states, including their right to vote, to participate in judicial proceedings, and to access public buildings and facilities. Title II also operates to enable individuals with disabilities to exercise their right to travel, to protect them from cruel and unusual punishment, and to enable them to participate fully in educational and other government programs. Because these important constitutional rights were at stake, Congress had wide latitude to construct legislation to remedy existing state discrimination against individuals with disabilities and to prevent further discrimination.

Unlike state conduct affecting the rights protected by Title I of the ADA, state classifications and conduct affecting the exercise of the rights underlying Title II invoke heightened scrutiny. *See Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966). When Congress acts to protect such fundamental rights as the right to vote or to access courthouses and other public buildings, the rational basis review applied in *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62 (2000); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997); and *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), and the "congruence and proportionality" test employed in those cases are inappropriate tests of whether Congress has exceeded its constitutional authority. *Cf. Nevada Dep't of Human Resources* v. *Hibbs*, 123 S. Ct. 1972, 1982-83 (2003) (acknowledging that Congress has broad discretion to legislate to enforce constitutional principles that invoke a heightened level of scrutiny of state conduct). Instead, as it historically has done with legislation enacted to remedy the effects of discrimination invoking heightened scrutiny, the Court should apply the deferential rational means test first enunciated in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *See Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (upholding Voting Rights Act of 1965).

Title II is a rational means of effectuating the protection of individuals' with disabilities constitutional rights under the Fourteenth Amendment. That alone requires rejection of Tennessee's claim of immunity.

Even if the Court were to apply the congruence and proportionality test implemented in *Garrett*, however, Title II's abrogation of the states' Eleventh Amendment immunity would survive. First, the legislative history behind Title II is compelling, well-defined, and explicit. It shows that Congress became

informed of a nationwide pattern of unconstitutional discrimination by the states against persons with disabilities in the provision of public services and access to public accommodations, including specifically access to courts. Indeed, as both the majority and dissenting opinions in *Garrett* noted, the bulk of the legislative history supporting the Act pertained to this type of discrimination against individuals with disabilities. *Garrett*, 531 U.S. at 360 n.1, 372 n.7. Not surprisingly given the testimony before Congress, Title II is aimed directly at preventing and remedying discrimination in the provision of public services and access to public accommodations.

Second, the scope of Title II is no broader than necessary to achieve its critical purposes. As the Court instructed in *City of Boerne*, "[t]he appropriateness of remedial measures must be considered in light of the evil presented." 521 U.S. at 530. Because the discrimination Congress addressed affects the exercise of fundamental rights and liberties and is subject to heightened review, the scope of the remedial measures permitted under § 5 is broad — broader than that permitted under § 5 when Congress acts to affect classifications invoking only rational basis review. Congress acted in response to a widespread pattern of discrimination by states against individuals with disabilities and tailored Title II to remedy these specific constitutional violations. Title II therefore meets the congruence and proportionality test laid down in *Garrett*.

Finally, although Title II meets the congruence and proportionality test set out in *Garrett*, *amici* do not wish to endorse this standard as proper for review of *any* legislation. For the reasons discussed in dissenting opinions in *Garrett* and *Kimel*, *amici* respectfully submit that this standard is premised on an unworkable view of the legislative process, effectively requires Congress to dramatically alter the way in which it

legislates, and threatens to violate separation of powers principles by imposing judicial requirements upon Congress's legislative procedure. *Amici*, therefore, respectfully urge the Court to return to its prior rational means standard enunciated in *M'Culloch*.

ARGUMENT

I. TITLE II OF THE ADA GUARANTEES THE FUNDAMENTAL RIGHTS AND LIBERTIES OF INDIVIDUALS WITH DISABILITIES.

Congress enacted Title II of the ADA to protect individuals with disabilities from violations of their fundamental rights and liberties by state and local governments. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (2003). Congress sought in Title II to address its explicit finding that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3). Within these areas, individuals with disabilities have constitutional rights arising under the Due Process Clause of the Fourteenth Amendment.

The Due Process Clause incorporates most of the guarantees of the Bill of Rights and encompasses state conduct subject to constitutional limitations embodied in the First, Fourth, Fifth, Sixth, Eighth Amendments. *See Duncan* v. *Louisiana*, 391 U.S. 145, 148 (1968). Where fundamental rights and liberties such as the ones guaranteed by these Amendments are involved, state

discrimination is subjected to strict scrutiny, *see Harper*, 383 U.S. at 670, and must be justified with a compelling state interest. *See Olmstead* v. *Zimring*, 527 U.S. 581 (1999) (right to be free from unreasonable confinement); *Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (right to marry); *Stanley* v. *Illinois*, 405 U.S. 645 (1972) (right to custody of one's children); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (right to travel); *Harper*, 383 U.S. at 663 (voting); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942) (right to procreate); *cf. Garrett* 531 U.S. at 373 (describing the Voting Rights Act of 1965 as a valid exercise of Congress's power under § 2 of the Fifteenth Amendment). Congress's power to legislate to protect citizens from such state discrimination is at the core of § 5.

The legislative record confirms that Congress was concerned with due process violations, such as inaccessible courthouses and the infringement of individuals' with disabilities right to participate in judicial proceedings, when it enacted Title II. Congress heard an abundance of testimony and reviewed a number of reports concerning the inability of individuals with disabilities to participate in judicial proceedings in courthouses throughout the nation. 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legis. Hist. of Pub. L. No.* 101-336: *The Americans with Disabilities Act*, 100th Cong., 2d Sess. 936 (Comm. Print 1990) (Sen. Harkin) (*Leg. Hist.*). One individual shared the following illustrative account:

> I went to the courtroom one day . . . I could not get into the building because there were about 500 steps to get in there. [T]he security guard . . . told me there was an entrance at the back door for the handicapped. . . . I went to the back door and there were three more stairs for me to get over to be able to ring a bell to announce my arrival so that somebody would come and open the door and maybe let me in. . . . This is the court system that is supposed to give me a fair hearing. It took me 2 hours to get in. . . .

Oversight Hearing on H.R. 4498, Americans with Disabilities Act: Hearing Before the Subcomm. on Select Educ. of the House Comm. On Educ. & Labor, 100th Cong., 2d Sess. 40 (1988) (Emeka Mwojke).

Other disturbing examples of discrimination brought to Congress's attention through the Task Force on Rights and Empowerment of Americans with Disabilities highlighted a multitude of instances where courts were not accessible or did not have services needed by individuals with disabilities. *Garrett*, 531 U.S. at 391-424 (App. C to opinion of Breyer, J., dissenting). The summaries repeatedly referenced individuals with disabilities who faced "inaccessible public buildings," "inaccessible state buildings," and "inaccessible government buildings." *Id.*

Many courts, including this Court, have held that the Due Process Clause guarantees access to judicial proceedings. Inaccessible courtrooms and courtrooms closed to the public potentially violate the rights of both individuals with disabilities and the general public. Pursuant to the Sixth Amendment and the Due Process Clause, a criminal defendant has "a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975). Mr. Lane's exclusion from the courtroom plainly compromised the fairness of the proceedings against him. Criminal defendants also have the right to have their trials open to the public. *See Waller* v. *Georgia*, 467 U.S. 39, 46 (1984). Likewise, civil litigants have a due process right to be present

in the courtroom unless their exclusion furthers important government interests. *Helminski* v. *Ayerst Labs.*, 766 F.2d 208, 213 (CA6 1985). Even non-parties have a First Amendment right to view public proceedings in court. *See Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986); *Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 574 (1980); *Brown & Williamson* v. *F.T.C.*, 710 F.2d 1165, 1179 (CA6 1983). Title II serves to prevent these constitutional violations.

Concern about the exercise of other fundamental rights by individuals with disabilities also motivated Title II's enactment. For example, Congress was concerned with the ability of individuals with disabilities to exercise their right to vote. This Court has acknowledged several times that the right to vote is a fundamental right guaranteed by the Constitution. *See, e.g.*, *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 217 (1986); *Reynolds* v. *Sims*, 377 U.S. 533 (1964). Evidence abounds throughout the legislative record of the ADA that Congress sought to address violations of this fundamental right by enacting Title II. Recounting testimony from Neil Hartigan, then Attorney General from Illinois, the Senate Report specifically mentions the need to ensure access to polling places. S. REP. No. 101-116, at 12 (1989). Hartigan testified: "'You cannot exercise one of your most basic rights as an American if the polling places are not accessible.'" *Id.* Congress was likewise aware that some individuals with disabilities had been forced to vote by absentee ballot before the candidates had participated in key debates. *Id.* Furthermore, like inaccessible courthouses, examples of inaccessible polling places and other procedural deficiencies related to voting flooded the report submitted to Congress by the Task Force on Rights and Empowerment of Americans with Disabilities. *Garrett*, 531 U.S. at 391-424 (App. C to opinion of Breyer, J., dissenting).

Given Congress's recognition of and intent to remedy longstanding state discrimination infringing on individuals' with disabilities due process rights, Congress was constitutionally authorized to use great latitude in enacting Title II. Unlike Title I of the ADA, which was enacted to enforce persons' with disabilities equal protection rights to employment only, Title II was drafted to enable individuals with disabilities to exercise fundamental rights and liberties guaranteed by the Constitution. In that respect, Title II is less similar to Title I and more like the Family and Medical Leave Act ("FMLA"), which was reviewed by this Court in *Hibbs*. State classifications affecting fundamental rights and state gender discrimination both trigger a heightened level of scrutiny. Furthermore, like Congress's previous efforts to remedy the gender discrimination targeted by the FMLA, previous efforts to remedy discrimination against individuals with disabilities in exercising fundamental rights were also unsuccessful. There is an explicit acknowledgement in the ADA's legislative history that "Federal and State laws [were] inadequate to address the discrimination faced by people with disabilities." S. REP. 101-116, at 6 (1989). As recognized by the *Hibbs* Court, "[s]uch problems may justify added prophylactic measures in response." 123 S. Ct. at 1982. While *amici* respectfully disagree with the application of the "congruence and proportionality" test, which was applied in *Hibbs*, the ultimate conclusion reached by the *Hibbs* Court is similarly justified in this case. Because fundamental rights and liberties were at stake when Congress enacted Title II, there should be no doubt that Congress validly abrogated states' Eleventh Amendment immunity to enforce the Fourteenth Amendment.

II. FOR LEGISLATION INTENDED TO PROTECT AGAINST CONSTITUTIONAL VIOLATIONS INVOKING HEIGHTENED SCRUTINY, COURTS SHOULD APPLY THE RATIONAL MEANS TEST ENUNCIATED IN *M'CULLOCH v. MARYLAND.*

Where fundamental rights and liberties are at issue, this Court has not held that the congruence and proportionality test is appropriate. Indeed, prior to *City of Boerne*, when reviewing § 5 legislation the Court applied the rational means test enunciated in *M'Culloch* v. *Maryland*.[2]

The *M'Culloch* standard requires only a rational relationship between the ends of the legislation and Congress's chosen means. In the words of Chief Justice Marshall:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist[ent] with the letter and spirit of the constitution, are constitutional.

M'Culloch, 17 U.S. (4 Wheat.) 316, 421. Under this test, the desirability of the legislation as a policy matter, or the extent to which Congress might have chosen other, more narrowly tailored means, is beyond the scope of the Court's review. All that the Court need determine is whether the legislation is a rational means of enforcing the Fourteenth Amendment's substantive guarantees.

2. Although the Court, in *dicta*, used the words "congruence" and "proportional" in reviewing the Violence Against Women Act, *see United States* v. *Morrison*, 529 U.S. 598 (2000), the holding in *Morrison* was that the VAWA was unconstitutional because it was directed not "at any State or state actor, but at individuals who . . . committed criminal acts motivated by gender bias." *Id.* at 626.

Title II is a rational means of addressing the documented pattern of discrimination by the states against individuals with disabilities. When Congress passed Title II, it was well aware that individuals with disabilities like George Lane and Beverly Jones were, among other things, burdened by inaccessible courthouses, inaccessible polling places, inaccessible public transportation, and inaccessible government buildings and agencies. Responding to this problem of limited access, Congress enacted Title II to ensure that individuals with disabilities would not continue to be shut out of polling places, public buildings, schoolhouses, and other vital public facilities. In doing so, Congress took steps to mediate the impact on states. For example, rather than mandating that public entities overhaul their buildings and facilities completely, Congress structured Title II to require states to make only "reasonable modifications" that do not "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). In addition, states are required to make these modifications only for "qualified individual[s] with a disability." *See* 42 U.S.C. § 12132.

Although, as discussed below, Title II is also a congruent and proportional means of addressing discrimination against individuals with disabilities, the Court need not conduct that more exacting analysis. In the context of fundamental rights, state discrimination is presumptively unconstitutional and Congress's chosen means of addressing that discrimination need only be rational. Title II serves a legitimate end, is consistent with the letter and spirit of the constitution, and brings to bear means that are plainly and rationally adapted to achieve its purposes. Congress acted well within the scope of its constitutional powers when it enacted Title II.

III. EVEN UNDER THE ANALYSIS SET FORTH IN *GARRETT*, TITLE II IS APPROPRIATE LEGISLATION UNDER § 5 OF THE FOURTEENTH AMENDMENT.

Assuming the Court departs from the well-established standards in *M'Culloch*, Title II is nevertheless a congruent and proportional response to the states' documented history of discrimination against individuals with disabilities. Under the framework set out in *Garrett*, after determining that Congress unequivocally expressed its intent to abrogate the states' immunity, a court turns to whether Congress properly exercised its power to abrogate.[3] First, the Court must "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Second, the Court must ask "whether Congress identified a history and pattern of unconstitutional . . . discrimination by the states." *Id.* at 368. Last, the Court must determine whether the legislation is congruent and proportional to the identified wrong.

3. The first step of this analysis questions whether Congress explicitly expressed its intent to abrogate the states' Eleventh Amendment immunity. *See Kimel*, 528 U.S. at 73; *Seminole Tribe* v. *Florida*, 517 U.S. 44, 55 (1996) There is no dispute in this case that this criterion has been met. Pet'r Br. at 12; 42 U.S.C. § 12202. There is also no dispute that § 5 of the Fourteenth Amendment is a valid source for this power to abrogate. Pet'r Br. at 12.

A. Title II Is Intended to Guarantee Individuals with Disabilities Equal Opportunity to Obtain Vital Services and to Exercise Fundamental Rights and Liberties.

The majority in *Garrett* instructed that a court must "identify with some precision the scope of the constitutional right at issue" and define the "metes and bounds" of that right. *Garrett*, 531 U.S. at 365-68. As discussed in Parts I and II above, Title II is intended to prohibit and remedy violations of the Due Process Clause and the infringement by the government of the fundamental rights and liberties of individuals with disabilities. These fundamental rights and liberties, which frequently overlap with the right to equal protection, include the right to vote, to access the courts and the government process, to bear children, to have custody of one's children, to marry, and to be free from unreasonable confinement. Discrimination such as a state's refusal to provide reasonable access to the courts for individuals with disabilities is presumptively unconstitutional under the Due Process Clause and the Equal Protection Clause.

Title II also helps insure that individuals with disabilities have the same equal access to their government as all other citizens, a fundamental principal embodied by the equal protection clause: "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). Thus, while Congress's power to enact Title II and to abrogate the states' Eleventh Amendment Immunity was rooted in its authority to enforce the Due Process Clause of the Fourteenth Amendment, Congress recognized that Title II would also inevitably protect the Equal Protection rights of individuals with disabilities.

B. Congress Supported Title II With Specific Findings Concerning the Pervasiveness of State Discrimination Against Individuals with Disabilities in the Provision of Programs and Services.

Congress enacted Title II in light of a history and pattern of unconstitutional discrimination by the states against people with disabilities. *Garrett*, 531 U.S. at 368. The legislative history of the ADA shows that the vast majority of unconstitutional discrimination by the states related to the states in their role as public entities and providers of government services. In *Garrett*, the Court acknowledged that the "overwhelming majority of these accounts [of discrimination in the legislative history] pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA." *Garrett*, 531 U.S. at 371-72 & n.7. The strength of this legislative history is evidenced by Congress's specific findings of persistent discrimination in the provision of public services and accommodations. 42 U.S.C. § 12101(a)(3), (5)–(9). The legislative history of the ADA fully supports valid abrogation of Eleventh Amendment immunity under Title II.

In enacting the ADA, Congress made explicit findings of persistent discrimination by the states in the provision of public services and accommodations. 42 U.S.C. § 12101(a)(3) ("discrimination against individuals with disabilities persists in such critical areas as . . . public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services"); *see also* 42 U.S.C. § 12101(a)(5) ("individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion; the discriminatory effects of architectural, transportation, and communication barriers,

overprotective rules and policies, failure to make modifications to existing facilities and practices"); *id.* § 12101(a)(6) ("census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally"); *id.* § 12101(a)(7) ("individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations . . . and relegated to a position of political powerlessness in our society"); *id.* § 12101(a)(8) ("the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency"); *id.* § 12101(a)(9) ("the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous").

Congress insured that its legislative response to the invidious and widespread discrimination by the states against individuals with disabilities in the provision of public services and public accommodations was appropriate.[4]

4. Congress held thirteen hearings and mobilized a special task force to examine whether the ADA would be appropriate legislation. *See Garrett*, 531 U.S. at 377 (Breyer, J., dissenting). Moreover, both the House and Senate cited seven substantive studies or reports to support its conclusion that discrimination against individuals with disabilities is a serious, widespread problem. S. REP. NO. 101-116, at 6 (1989); H.R. REP. NO. 101-485 a, pt. 2 at 28, U.S.C.C.A.N. 1990, 267, 309-310 (1990). The legislative record demonstrates that Congress identified numerous findings of unconstitutional discrimination by states falling under the ambit of Title II. *See* 42 U.S.C. § 12101(a)(2)-(a)(3), (a)(5)-(a)(6); H.R. REP. NO. 101-485, pt. 2, at 22, 30, 42 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 303, 310, 311-12, 324. This legislative record goes

(Cont'd)

The Congressional Committee Reports conclude that state discrimination in the areas of public accommodations and public services reveals a "compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of . . . public accommodations [and] public services." H.R. REP. No. 101-485, pt. 2, at 28 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 303, 310; *see also* S. REP. No. 101-116, at 6 (1989). Particularly notable because of the facts of this case, one study conducted in 1980 found that 76% of state-owned buildings available to the general public were physically inaccessible and unusable for providing services to individuals with disabilities. *See* 135 Cong. Rec. 8,712 (1989) (remarks of Rep. Coehlo discussing U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 38-39 (1983)); 100th Cong., 2d Sess. 40-41 (1988) (testimony of Emeka Nwojke discussing courthouse access).

In addition, Appendix C of *Garrett* cites hundreds of allegations of discrimination against individuals with disabilities falling under the ambit of Title II. *Garrett*, 531 U.S. at 372 n.7. These submissions enabled Congress to identify an overwhelming number of instances of discriminatory conduct by *state* actors, ranging from inaccessible courthouses and polling places to an inaccessible "office of handicapped services" at the University of Georgia, which was located on the second floor. *Id.* at 401. Moreover, these findings evidence a history and pattern of widespread discrimination, as many states were cited numerous times for continually committing similar violations and a substantial number of these violations occurred

---

(Cont'd)

far beyond the "unexamined, anecdotal accounts" of discrimination criticized by this Court in *Garrett*. 531 U.S. at 370. *Cf. City of Boerne*, 521 U.S. at 530-31 (relying on testimony in congressional hearings to demonstrate valid abrogation).

nationwide. The concern expressed by the Court in *Garrett* about what it found to be a lack of legislative evidence directly supporting Title I is met in the context of Title II. Ample congressional evidence, compiled "after extensive review and analysis over a number of Congressional sessions," H.R. REP. No. 101-485, pt. 2, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310, reveals a pattern of state discrimination against individuals with disabilities in the area of public services and public accommodations.

Petitioners contend that Congress' legislative record acknowledged the states as leaders in "safeguarding the rights of the disabled." Pet'r Br. at 22. While it is true that states such as Tennessee enacted various laws protecting the rights of individuals with disabilities, *see, e.g.*, Tenn. Code Ann. § 8-50-103, when Congress enacted the ADA, Congress recognized that then "[c]urrent Federal and State laws [were] inadequate to address the discrimination faced by people with disabilities in these critical areas." S. REP. 101-116, at 6 (1989). Even with the enactment of the ADA, as shown by this case, many states still failed to meaningfully address discrimination against individuals with disabilities. As Justice Rehnquist noted in *Hibbs*, 123 S. Ct. at 1980, the Court should not ignore states' shortcomings by referencing their efforts to remedy discrimination. Although Tennessee put a formal guarantee of access on its law books, George Lane still had to crawl up stairs to appear at a judicial proceeding that required his presence. It was not until this lawsuit was brought that an elevator was added to the courthouse building. Without the threat of damages suits for ADA violations, states may continue to take a lackadaisical approach to addressing discrimination against individuals with disabilities.

C. The Substantive and Remedial Provisions of Title II are Proportional and Congruent to the Rights Protected by the Legislation.

Because Congress has "wide latitude" in defining the bounds of § 5 through prophylactic and remedial legislation, *City of Boerne*, 521 U.S. at 520, the congruence and proportionality analysis does not require an exact match between legislative and constitutional prohibitions. Rather, as noted in *Kimel*, the affirmative grant of legislative power contained in § 5 of the Fourteenth Amendment permits Congress to "remedy and deter" unconstitutional acts that violate § 5, as well as "prohibit[ ] a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S. at 81 (citing *City of Boerne*, 521 U.S. at 518). The *Court* recently affirmed this principle in *Hibbs*, 123 S. Ct. 1972 (holding that the abrogation of states' Eleventh Amendment immunity by the FMLA was a valid act of Congress under § 5 of the Fourteenth Amendment). As the Court noted in *Hibbs*, as long as Congress does not attempt to redefine the obligations of the states, Congress may exercise its § 5 power to "enact so-called prophylactic legislation that proscribes facially constitutional conduct in order to prevent and deter unconstitutional conduct." *Id.* at 1973. "[L]egislation which 'deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional.'" *Id.* at 1992 (quoting *City of Boerne*, 521 U.S. at 518).

The appropriateness of Title II should be examined in light of the injuries that Congress was seeking to remedy and prevent. *City of Boerne*, 521 U.S. at 530. These injuries included violations of persons' with disabilities right to access courts, to vote, to travel, and to have custody of one's children. Thus, the

evils before Congress involved the infringement of fundamental rights and liberties guaranteed by the United States Constitution.

Title II is congruent and proportional to the evils identified by Congress because it is tailored to remedy these constitutional violations while placing the least burden possible on states. First, the requirements under Title II are narrowly tailored and sensitive to financial and other burdens the requirements may place on the states. For example, Title II only requires a public entity to ensure that "when viewed in its entirety, [it] is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). It also does not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." *Id.* § 35.150(a)(2). Moreover, except for new construction and alterations, public entities need not take any steps that would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." *Id.* § 35.150(a)(3); *see also* 28 C.F.R. §§ 35.130(b)(7), 35.164; *Olmstead* v. *Zimring*, 527 U.S. 581, 606 n.16 (1999).

Second, states retain discretion to exclude persons from programs, services, or benefits for any lawful reasons unrelated to disability. A state is required only to make "reasonable modifications in policies, practices, and procedures" that do not "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7); *see also* 42 U.S.C. § 12131(2) (defining "qualified individual with a disability" as an individual "who, with or without *reasonable* modifications . . . , meets the essential eligibility requirements for the receipt of services") (emphasis added). Title II permits discrimination based on disability if a person cannot "meet[] the essential eligibility requirements" of the governmental program or service. 42 U.S.C. § 12131(2). *See also Popovich v. Cuyahoga County*

Court, 276 F.3d 808, 820 (CA 6 2002) ("Title II requires reasonable modifications only when a disabled individual is otherwise eligible. . . . The states therefore maintain their discretion over the provision of public services so long as they do not arbitrarily discriminate against the disabled.")

The availability of a damages remedy is critical to the protection of the fundamental rights and liberties of individuals with disabilities. The availability of damages enables Title II plaintiffs to obtain representation more easily from private attorneys and accelerates state compliance. States facing exposure to liability for damages and attorneys' fees are more likely to comply with the law in advance of litigation. *See* NAT'L COUNCIL ON DISABILITY, *TENNESSEE V. LANE*: THE LEGAL ISSUES AND THE IMPLICATIONS FOR PEOPLE WITH DISABILITIES (2003), *at* http://www.ncd.gov/newsroom/publications/legalissues.html. Injunctive relief alone fails to afford these incentives. Moreover, injunctive relief only prevents future misconduct. It does nothing to make whole individuals who have been injured by violation of their fundamental rights. *Id.*

Title II is proportional and congruent. It is targeted to protect the fundamental rights and liberties of individuals with disabilities. The obligations imposed on the states are limited and sensitive to the financial and other burdens imposed on the states. The private right of action for damages is essential to the effectiveness of Title II. Therefore, Congress acted within its power to abrogate the Eleventh Amendment immunity of the states.

IV. THE RIGOROUS STANDARD OF REVIEW RECENTLY APPLIED TO § 5 LEGISLATION UNDULY COMPROMISES CONGRESSIONAL POWER.

Although Title II meets the standard of review employed to determine congruence and proportionality in cases like *Kimel* and *Garrett*, *amici* respectfully urge the Court to return to the traditional, deferential standard used in evaluating the validity of all legislation enacted pursuant to Congress's § 5 powers.

In *City of Boerne* and subsequent cases, the Court has continued to recognize that it should defer to Congress's judgments because "[i]t is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Kimel*, 528 U.S. at 80-81 (quoting *City of Boerne*, 521 U.S. at 517). Nevertheless, in applying the congruence and proportionality standard, the Court has closely scrutinized the legislative record for evidence of a "pattern" of unconstitutional state discrimination, has insisted that attempts to deal with such discrimination on a uniform, national basis be supported by evidence in the record, and has questioned the quality of the evidence that is reflected in the record and the inferences that Congress was entitled to draw from it.

Respectfully, we submit that this approach is inconsistent with the principle of separation of powers and unduly intrudes on Congress's legislative function. The Court has noted that

> [a] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. Only by faithful adherence to this guiding principle . . . is it

> possible to preserve to the legislative branch its rightful independence and its ability to function.

FCC v. *Beach Communications*, 508 U.S. 307, 308, 315 (1993) (citations omitted). Yet, in determining congruence and proportionality in cases such as *Kimel* and *Garrett*, the Court has required that Congress indicate the "reasons for [its] action" in the legislative record and support those "reasons" with evidence of the necessity of § 5 legislation. *Kimel*, 528 U.S. at 88. The Court thus appears to have imposed an evidentiary standard more appropriate to an administrative agency than a coordinate branch of the Federal Government. *See Garrett*, 531 U.S. at 376 (dissenting opinion of Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ.).

Moreover, the Court appears to have limited the inferences that Congress may draw through the use of common sense from the information it has received from multiple sources. For example, in *Garrett*, the Court held that substantial evidence of society-wide stereotypes concerning individuals with disabilities, and even discrimination by government officials, did not provide a sufficient basis for Congress to infer that state officials were as likely to hold the same stereotypes and prejudices that affected or were likely to affect their treatment of individuals with disabilities. *See id.* at 377-78. And the requirement of a record showing a pattern of discriminatory state action also implies that Congress's power "to enforce" the Fourteenth Amendment is limited to legislation remedying past conduct that can be reflected in a record and precludes it from legislating prophylactically to protect against incipient or potential conduct that threatens to undermine the guarantees of the Fourteenth Amendment. *See* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 93 (2002).

With all respect, we believe that the Court's standard of review in these cases not only violates the separation of powers by imposing judicial requirements upon Congress's legislative procedure, but also reflects an unworkable view of the legislative process and, in effect, calls upon Congress to dramatically alter the way in which it legislates.

First, the Court's apparent requirement that Congress articulate a single, coherent policy rationale and support that rationale with evidence in the legislative record does not accord with the reality of the legislative process. Members of Congress represent constituencies with diverse, often conflicting, interests. Hence, legislation is rarely, if ever, reached through consensus, but rather, through competition and majority vote. *See* Philip P. Frickey & Steven S. Smith, *Judicial Review, The Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 Yale L.J. 1707, 1741-45 (2002). Moreover, legislation is generally the product of a competitive process of bargaining and coalition-building as opposed to the type of deliberation engaged in by judicial and administrative bodies. Accordingly, in many, if not most, cases, no single, identifiable rationale exists. *See id.* at 1744-45.

In addition, the Court's requirement of an evidentiary predicate in the legislative record mistakenly assumes that all the information Congress draws upon in enacting legislation is incorporated in that record. Congress is informed through numerous sources that are not reflected in the legislative record. For example, Members of Congress bring to the legislature the views and experiences of the citizens whom they represent. Thus, unlike a trier of fact in a court or an administrative law judge, Congress is not a "*tabula rasa* until it conducts on-the-record proceedings," but rather, "grounds its claim to legitimacy on

knowledge of and accountability to the citizens it represents." A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 Cornell L. Rev. 328, 385-86 (2001). In addition, Congress acquires information from, *inter alia*, communications with interest groups, information support services such as the General Accounting Office and the Congressional Research Service of the Library of Congress, written materials from party leadership offices, members' caucuses, legislators' personal staffs, and communications with the executive branch. *See id.* at 384-87; Frickey & Smith, *supra*, at 1734-36.

Among the branches of the Federal Government, Congress is uniquely capable of amassing information from a wide range of sources, both during and outside of its formal proceedings. Reliance on the legislative record alone is therefore an incomplete measure of the basis for Congress's judgments. More significantly, however, it appears that if Congress were to satisfy the congruence and proportionality test as applied in cases like *Kimel* and *Garrett*, it must painstakingly catalogue the information acquired from such extra-record sources in the legislative record. For the reasons discussed above, this would mark a dramatic alteration of Congress's legislative procedure.

Furthermore, by requiring Congress to adhere to judicially imposed procedural requirements when it legislates, the Court's application of the congruence and proportionality test conflicts with at least the spirit of a number of constitutional provisions that limit judicial intrusion into the legislative sphere. These include the Rules and Journal Clauses of Article I, which provide, respectively, that "[e]ach House may determine the rules of its proceedings" and "shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy." U.S. Const. art. I, § 5,

cls. 2, 3. The Court has interpreted both of these provisions as giving Congress wide discretion to determine how to report and record its consideration of legislation. *See, e.g., United States* v. *Ballin*, 144 U.S. 1 (1892); *Field* v. *Clark*, 143 U.S. 649 (1892).

The more demanding standard of review applied in cases such as *Kimel* and *Garrett* also appears to conflict with the Speech or Debate Clause, which provides that "for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place." U.S. Const. art. I, § 6, cl. 1. The Court has determined that one of the Speech or Debate Clause's chief purposes is "to insure that the legislative function the Constitution allocates to Congress may be performed independently" and "reinforc[e] the separation of powers so deliberately established by the Founders." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 502 (1975). *See also Gravel* v. *United States*, 408 U.S. 606, 628-29 (1972) (holding that Speech or Debate Clause prohibited court from inquiring into conduct of, or preparation for, congressional proceeding); Bryant & Simeone, *supra*, at 376-83.

The Court's approach, first articulated in *City of Boerne* and applied in cases like *Kimel* and *Garrett*, reflects two concerns: first, that in the absence of a judicially recognized history of state discrimination, Congress actually may be seeking to expand the substantive scope of the Fourteenth Amendment or may be adopting a remedy that is disproportionate to the number of instances of unconstitutional state conduct; and second, that in such circumstances, there is a need to protect the sovereignty of the states against unwarranted intrusions by Congress in the guise of enforcing the Fourteenth Amendment. We respectfully submit that neither concern justifies the intrusion into the legislative process that application of the standard of review in cases like *Kimel* and *Garrett* has entailed.

In the absence of conduct involving a judicially recognized history of unconstitutional state action, this Court has limited itself to rational basis review in evaluating whether state conduct entails arbitrary and purposeful discrimination, in recognition of the Court's own fact-finding limitations and the deference due to democratically elected legislatures. But it is precisely because Congress, as a democratically elected legislature, is not so limited that it is inappropriate to impose a rigorous standard of judicial review on Congress's determination of the existence or a threat of unconstitutional state conduct, even if not previously recognized by the Court. *See Garrett*, 531 U.S. 356, 382-85 (opinion of Breyer, J., dissenting, joined by Stevens, Souter, and Ginsberg, JJ.); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 Yale L.J. 441, 467-73 (2000). As discussed above, in making legislative judgments, Congress relies on many sources of information and intuition that would not support a judicial or administrative determination, but which are characteristic of a democratic legislative process. The Fourteenth Amendment expressly assigns to Congress the task of enforcing its guarantees and, under the long tradition established by *M'Culloch*, its judgments that there exists arbitrary and purposeful state discrimination requiring legislation, and what legislation is "appropriate" to enforce the Fourteenth Amendment's guarantees against such discrimination and its effects, deserve deference and respect.

Concerns that Congress may be unjustifiably intruding on state sovereignty do not support a more rigorous standard of review of Congress's legislative judgments under § 5. To begin with, as the Court has recognized, the Civil War Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455-56 (1976) (noting that the Amendments

effected "the expansion of Congress' powers with the corresponding diminution of state sovereignty") (discussing *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)). Moreover, the states are not an isolated minority requiring heightened judicial protection against a tyrannical majority. To the contrary, the political process and the structure of the Federal Government – in particular, the states' equal representation in the Senate – were the principal means intended by the Framers to prevent inappropriate intrusions by the federal legislature on the states' sovereignty. *See Kimel*, 528 U.S. at 93-94 (opinion of Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985).

The standard recently applied by the Court to determine congruence and proportionality substitutes the Court's views of how Congress should conduct its lawmaking processes in carrying out its duty to "enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]," U.S. CONST. amend. XIV, § 5, and ultimately substitutes the Court's judgment for that traditionally left to Congress alone as to the "closeness of the relationship between the means [to be] adopted and the end to be attained." *Burroughs* v. *United States*, 290 U.S. 534, 548 (1934). This is a departure from the Court's historic recognition of its own institutional limitations and the deference due to the democratically elected legislative branch, except in cases where the Court's intervention is needed to protect the rights of individuals guaranteed by the Constitution and those "discrete and insular minorities" who do not have access to the democratic process to protect their rights against a dominant majority. *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). Accordingly, for the reasons discussed above, *amici curiae* respectfully urge the Court to reconsider the rigorous standard

of review it has recently applied to determine congruence and proportionality, even in cases where the Court has not previously recognized a history of purposeful unequal treatment.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

VINCENT A. ENG
THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM
1140 CONNECTICUT AVE., N.W.
Suite 1200
Washington, DC 20036
(202) 296-2300

DENNIS C. HAYES
General Counsel
THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
4805 Mt. Hope Drive
Baltimore, MD 21215-3297
(410) 580-5777

FOSTER MAER
THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND
99 Hudson Street, 14th Floor
New York, NY 10013

CHARLES LESTER, JR.
Counsel of Record
TERESA WYNN ROSEBOROUGH
DEBORAH M. DANZIG
JENNIFER N. IDE
ANDREW W. BROY
NICOLE D. LAWSON
SUTHERLAND ASBILL & BRENNAN LLP
999 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 853-8000

BARBARA R. ARNWINE
THOMAS J. HENDERSON
MICHAEL L. FOREMAN
KRISTIN M. DADEY
THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave., N.W.
Suite 400
Washington, DC 20005
(202) 662-8600

ELLIOT MINCBERG
DEBORAH LIU
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M Street, N.W., Suite 400
Washington, DC 20036
(202) 467-4999

ABBEY GANS
MICHAEL LIEBERMAN
THE ANTI-DEFAMATION LEAGUE
823 United Nations Plaza
New York, NY 10017
(212) 885-5885

Attorneys for Amici Curiae

Supreme Court, U.S.
FILED
NOV 14 2003
OFFICE OF THE CLERK

No. 02-1667

IN THE

Supreme Court of the United States

STATE OF TENNESSEE,
Petitioner,

vs.

GEORGE LANE, BEVERLY JONES, and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* BLANCHE FISCHER FOUNDATION IN SUPPORT OF RESPONDENTS

SHERRIL NELL BABCOCK
Counsel of Record

GIANELLI & MORRIS

880 West First Street, Suite 215
Los Angeles, California 90012-2447
(213) 620-7272

Attorneys for Amicus Curiae
BLANCHE FISCHER FOUNDATION

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (949) 720-1510

No. 02-1667

IN THE

Supreme Court of the United States

STATE OF TENNESSEE,
Petitioner,

vs.

GEORGE LANE, BEVERLY JONES, and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* BLANCHE FISCHER FOUNDATION IN SUPPORT OF RESPONDENTS

SHERRIL NELL BABCOCK
Counsel of Record

GIANELLI & MORRIS

880 West First Street, Suite 215
Los Angeles, California 90012-2447
(213) 620-7272

Attorneys for Amicus Curiae
BLANCHE FISCHER FOUNDATION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

1. BIPARTISAN RECOGNITION OF HISTORICAL DISCRIMINATION AND THE EXTRAORDINARY NATURE OF THE ADA ... 3

2. EXCLUSION OF THE DISABLED FROM THE COURTROOM 3

3. JUDICIALLY-APPROVED GOVERNMENTAL DISCRIMINATION AGAINST THE DISABLED 6

4. THE CONGRESSIONAL RECORD SHOWS KNOWLEDGE OF THE LEGACY OF FEAR AND PREJUDICE – AND A RESOLVE TO STOP IT 11

5. CONCLUSION 16

TABLE OF AUTHORITIES

Page

Cases

Association for Retarded Citizens v. Olson,
561 F. Supp. 473 (D.N.D. 1982) 11

Board of Trustees of the Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 2

Bremner v. Charles,
312 Ore. 274, 821 P.2d 1080 (Ore. 1991) 4

Buck v. Bell,
274 U.S. 200 (1927) 6, 8

Carlisle v. County of Nassau,
64 A.D.2d 15, 505 N.E.2d 64 (N.Y. 1978) 4

City of Cleburne v. Cleburne Living Ctr., Inc.,
473 U.S. 432 (1985) 9

Cleburne Living Ctr. v. Cleburne,
726 F.2d 191 (5th Cir. 1984) 9

Cook v. State,
9 Ore. App. 224 (Or. 1972) 7

Dickson v. Bober,
269 Minn. 334, 130 N.W.2d 526 (Minn. 1964) 4

Gage v. Bozarth,
505 N.E.2d 64 (Ind. 1987) 4

Page

Halderman v. Pennhurst State School & Hospital,
612 F.2d 84 (3d Cir. 1979) 9, 10

Helminski v. Ayerst Laboratories,
766 F.2d 208 (6th Cir. 1985) 4

In re Richardson-Merrell, Inc. Bendectin Products,
624 F. Supp. 1212 (S.D. Ohio 1985) 4

In re Sterilization of Moore,
289 N.C. 95, 221 S.E. 2d 307 (1976) 7

Jordan v. Deery,
778 N.E.2d 1264 (Ind. 2002) 4

Pennhurst State Sch. & Hosp. v. Halderman,
451 U.S. 1 (1981) 11

Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279
(E.D. Penn. 1972) 7

Plessy v. Ferguson,
163 U.S. 537 (1896) 6

Province v. Center for Women's Health and Family Birth, 20 Cal. App. 4th 1673,
25 Cal. Rptr. 2d 667 (Cal. 1993)
rev. denied (1994 Cal. LEXIS 1190) 3

Regents v. Bakke,
438 U.S. 265 (1978) 6

Page

Vaughn v. Ruoff,
253 F.3d 1124 (8th Cir. 2001) 9

Whitfield v. Roth,
10 Cal.3d 874, 112 Cal. Rptr. 540 (Cal. 1974) 4

Statutes

42 U.S.C. §§ 6001-6081 10

42 U.S.C. § 12101 3

Congressional Record

134 Cong. Rec. H2894, at H2894 (daily op.
May 3, 1988) (statement by Rep. Owens.) 15

135 Cong. Rec. S4984, S4985 (daily op.
May 9, 1989) (statement by Sen. Harkin) 15

135 Cong. Rec. S10765, S10792 (daily op.
Sept. 7, 1989) (Statement by Sen. Biden.) 15

136 Cong. Rec. E1913, E1913 (ext. of remarks,
June 13, 1990) (statement by Rep. Hoyer.) 12

136 Cong. Rec. H4614, H4622-H4623 (daily ed.
July 12, 1990) (statement by Rep. Owens.) 14

Page

136 Cong. Rec. S7422, S7441 - S7442 (daily ed.
June 6, 1990) (Letter from Affiliated Leadership
League of and for the Blind and nearly 80
other organizations) 12

136 Cong. Rec. S9519, at S9519 - S9520.
(Daily Op. July 11, 1990) (Letter from
Louis Sullivan.) 14

136 Cong. Rec. S9527, S9530 (Daily Op. July 11,
1990.) (Statement by Sen. Kennedy) 14

136 Cong. Rec. S9680 at S9680 (daily ed.
July 13, 1990) (ADA Conference Report,
statement of Sen. Kennedy) 13

136 Cong. Rec. S9684, S9685 (daily ed.
July 13, 1990) (statement by Sen. Hatch) 16

136 Cong. Rec. S9684, S9690 (daily ed. July 13,
1990) (statement by Sen. Metzenbaum) 6

136 Cong. Rec. S9684, S9692 (daily ed.
July 13, 1990) (statement by Sen. Chafee) 5

136 Cong. Rec. S16562, at S16562 (daily ed.
Oct. 24, 1990) (Letter from Pres.
George W. Bush) 12

136 Cong. Rec. S18123, S18127 (daily ed.
Oct. 25, 1990) (statement of Sen. Simon) 13

Page

Other Authorities

ACLU AIDS Project, "Epidemic of Fear," published in 1990, cited by Rep. Edwards 14

Harris, Louis & Associates, "The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream" (1986); "Implications for Federal Policy for the 1986 Harris Survey of Americans with Disabilities" (1988) 12

Johnson, Jennifer Mott, "Reproductive Ability for Sale, Do I Hear $200?" 43 Ariz. L. Rev. 205 (Spring, 2001) 8

Nirje, B., "The Normalization Principle, Changing Patterns in Residential Services for the Mentally Retarded," President's Committee on Mental Retardation (Rev. ed.1976) 10

Vega, Celia M., "Sterilization Offer to Addicts Reopens Ethics Issue," *New York Times*, January 3, 2003 8

INTEREST OF AMICUS CURIAE[1]

The Blanche Fischer Foundation is a private, nonprofit 501(c)(3) charitable organization founded in 1981 from a trust established by the late Blanche Fischer, a native of Long Creek, Oregon. It makes direct grants on behalf of individuals with physical disabilities. The aid may relate directly to the disability or may less directly foster independence. In its first 21 years, the Blanche Fischer Foundation awarded nearly $1.2 million to over 2,100 individual Oregonians with physical disabilities. It is one of a few foundations in the United States that makes grants on behalf of individuals.

The Executive Director, John P. Dziennik, has governor's appointments to the Oregon State Rehabilitation Council and to the State Independent Living Council and was elected vice chair of that organization in late summer 2002. At the national level, he is treasurer of Disability Funders Network, which is committed to disability advocacy and rights. It has been the personal experience of the Foundation's staff, board, and grantees that use of the Americans with Disabilities Act ("ADA") fosters physical and financial independence for those previously excluded or marginalized due to discrimination on the basis of their disability. The Foundation supports the position of Mr. Lane, Ms. Jones, and the United States Solicitor General in this matter, and has obtained consent of the parties to file this brief.

---

[1] No counsel for any party authored this brief in whole or in part and no person or entity other than amicus, their members, and their counsel have made monetary contributions to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) ("Garrett"), this Court noted that the record before it at that time failed to show a history of invidious discrimination against the disabled. The purpose of the Blanche Fisher Foundation in submitting this brief is to assist in fleshing out the record before this Court as to the existence of state support for discrimination against the disabled in the years prior to passing of the ADA. Same shows that the record absent in *Garret, supra,* does in fact exist, and in abundance.

There is a long and sordid history of discrimination against the disabled in this country. Action by governmental entities to discriminate against the disabled is apparent from decades of case law and continues through both subtle and vulgarly open means. To find for the state of Tennessee in this matter would necessitate a finding that Congress desired to permit this conduct to continue unabated. But the findings of Congress preceding the adoption of the ADA as reflected in its record on the ADA and prior statutes designed to remedy discrimination against the disabled show a far, far different intent. It is the purpose of this brief to highlight the record of discrimination existing at the time Congress passed the ADA, which it recognized was one of the most significant pieces of civil rights legislation in the history of this country.

ARGUMENT

1. BIPARTISAN RECOGNITION OF HISTORICAL DISCRIMINATION AND THE EXTRAORDINARY NATURE OF THE ADA

In passing the ADA, Congress specifically found that "historically, society has tended to isolate and segregate individuals with disabilities . . . ," "individuals with disabilities continually encounter various forms of discrimination, including ***outright intentional exclusion*** . . ." (emphasis added) . . . "[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment . . ." 42 U.S.C. § 12101. Such findings are amply supported by instances cited below, showing of exclusion of the disabled from the courtroom, or restrictions on their appearance therein. Such exclusions are sadly common as dirt in the history of this country.

2. EXCLUSION OF THE DISABLED FROM THE COURTROOM

The idea that even viewing a disabled person might be too much for some is the usual ground for exclusion of disabled persons from their own trials, and such exclusion occurs in state and federal courts. California has ignored the ADA and still permits its courts to bar the disabled from their own trials where their appearance might be unpleasant to a jury. In *Province v. Center for Women's Health and Family Birth*, 20 Cal. App. 4th 1673, 25 Cal. Rptr. 2d 667 (Cal. 1993) *rev. denied* (1994 Cal. LEXIS 1190), the Court held that a "physically disfigured" plaintiff was properly barred from entering the courtroom for her own trial because her disability

might upset jury members. *Accord, Whitfield v. Roth,* 10 Cal.3d 874, 896, 112 Cal. Rptr. 540 (Cal. 1974), footnote 27 - upholding bar of paralyzed plaintiff from jury's presence for more than ten minutes merely because plaintiff was in a wheelchair.

In *Carlisle v. County of Nassau*, 64 A.D.2d 15, 505 N.E.2d 64 (N.Y. 1978) a trial court barred a paralyzed plaintiff on the same basis, although the Court of Appeal reversed. In *Dickson v. Bober*, 269 Minn. 334, 130 N.W.2d 526 (Minn. 1964), a Minnesota Court of Appeal upheld complete exclusion of the disabled plaintiff from the court during trial. In *Gage v. Bozarth*, 505 N.E.2d 64 (Ind. 1987) exclusion of the disabled plaintiff during the liability phase of trial was upheld because the sight of disability might influence the jury. This case was overruled in *Jordan v. Deery*, 778 N.E.2d 1264 (Ind. 2002), which recognized that exclusion of the disabled from the courtroom was questionable after the ADA's passage, but ultimately relying on Indiana's constitutional right to be present at trial. Oregon, a state which regards emotional trauma as a grounds for sterilization (see below), continued to allow its courts to exclude the disabled from the courtroom at certain stages of trial, even after the ADA passed. *Bremner v. Charles*, 312 Ore. 274, 821 P.2d 1080 (Ore. 1991).

Federal courts also practiced discrimination against the disabled by barring them from court prior to the passage of the ADA. See *In re Richardson-Merrell, Inc. Bendectin Products*, 624 F. Supp. 1212 (S.D. Ohio 1985) – sight of the disabled might so upset a jury the members would lose ability for rational thought. *Accord, Helminski v. Ayerst Laboratories*, 766 F.2d 208 (6th Cir. 1985), relied upon by the overruled *Gage v. Bozarth* court, *supra.*

Such discrimination was cited by members of Congress on the record when adopting the ADA: "[F]amilies with a member who is mentally retarded have been refused service in a restaurant because the owner fears that other customers might be offended or uncomfortable eating near that family. Yet, such a practice is not only common, it is perfectly legal." 136 Cong. Rec. S9684, S9692 (daily ed. July 13, 1990) (statement by Sen. Chafee).

The idea that the disabled were distasteful or frightful to view, and should hide themselves away to make life more pleasant for "normal" people was one of the ideas that Congress wanted to smash by passing the ADA. Exclusion of the disabled from jobs and even courtrooms was seen as a cause of discrimination in and of itself. A society that was used to seeing the disabled going about their business, at work, at courts, or at play, was far more likely to find their inclusion in trials and on juries as part of the normal course of life.

Exclusion of Mr. Lane and Ms. Jones from the second floor of the Tennessee courthouse, unless subjected to the humiliation of being carried like a sack of potatoes, continues this dreadful legacy. Unless the disabled can go about their business as usual, and avoid being arrested merely because they demand a modicum of dignity, Congress' intent that the ADA foster the realization that the disabled were perfectly "normal" will be thwarted. It is the attitude that the disabled are somehow fundamentally "different" and therefore unworthy of inclusion, or to be forced into outright exclusion, that characterizes much case law in the past century. Such judicial opinion reflects the attitudes that Congress was insistent be corrected, as well as the strength with which prejudice against the disabled has held sway over our national conscience, even in the halls of justice.

3. JUDICIALLY-APPROVED GOVERNMENTAL DISCRIMINATION AGAINST THE DISABLED.

The disabled in the United States have been subjected to horrifying instances of the most vile discrimination by private and public entities. Discrimination against the disabled has also been approved even by the judiciary in days past. In *Regents v. Bakke*, 438 U.S. 265, 327 (1978), four of the Court's justices cited *Buck and Plessy v. Ferguson*, 163 U.S. 537 (1896), as showing the difficulty the judicial system has had in enforcing the Fourteenth Amendment where it collides with socially acceptable forms of discrimination against those perceived to be "others" "unlike us."

The Court is no doubt aware of the unfortunate history of the eugenics movement in the United States. Persons with disabilities have been so reviled that their right to exist or to have children, and consequently the right of those children to exist themselves, have not only been put into question by public debate, but actual sterilization forced upon them by government itself. See *Buck v. Bell*, 274 U.S. 200, 207 (1927), upholding state law coercing sterilization of epileptics and other "undesirable" Americans with disabilities, as a constitutional means of improving the population of our country. This is part and parcel of the "blatant and sometimes barbaric discrimination against individuals with disabilities" found by Congress to exist and persist at the time the ADA was adopted. 136 Cong. Rec. S9684, S9690 (daily ed. July 13, 1990) (statement by Sen. Metzenbaum). Strong words, but cruelly true words.

As of 1972, thirty-five states in the U.S. had statutes promoting sterilization of those with disabilities.

Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 295 (E.D. Penn. 1972). Eighteen years before the ADA was adopted, an Oregon Court of Appeals found there existed a permissible rational government interest in forced sterilization to prevent the birth of perfectly normal children just because they might require state assistance due to parental difficulties arising from disability. *Cook v. State*, 9 Ore. App. 224 (Or. 1972). The person to be sterilized there was a seventeen-year-old girl who suffered emotional problems due to a history of physical and sexual abuse, and was to be sterilized *solely* because of that abuse and its effect on her.

See also *In re Sterilization of Moore*, 289 N.C. 95, 103, 221 S.E. 2d 307 (1976), finding that the state's interest in limiting money for foster care and the like is sufficient justification to make a child a "wrongful life" merely due potential state savings by avoiding its birth: "The people of North Carolina also have a right to prevent the procreation of children who will become a burden on the State." Disability discrimination as a mere cost savings measure was alive and well when the ADA was passed.

Unfortunately, the belief that we can and should "breed" a "better" Amer[illegible]n and that the disabled are better off dead or never born in the first place is supported by surprising segments of our population. The use of government power, personnel, and public funds to foster this view is a far from uncommon circumstance today. For example, there is an organization in California affiliated with British eugenicist Christopher Brand[2] that advocates, and will pay a "reward"

---

[2] Mr. Brand is the author of *The G Factor*, a book that espouses the eugenics cause and describes persons whose ancestry is more recently from the African continent as possessing the lowest IQs.

to, any current ***or recovered*** drug or alcohol addict who agrees to be sterilized, as "We don't allow dogs to breed. We spay them. We neuter them." Celia M. Vega, "Sterilization Offer to Addicts Reopens Ethics Issue," *New York Times*, January 3, 2003. This group (going by the acronym "CRACK") happily refers to assistance it receives from state government entities to further its eugenics program, such as parole officers, government-funded treatment programs, social workers, foster parent agencies, and hospitals. (*Id.*)

If successful, CRACK would have prevented two of our last four Presidents from being born, and regards our current President and other highly prominent Americans as "manifestly unfit to continue their kind" (*Buck, supra*, 274 U.S. at 207) due solely to the fact of their disability. Eugenicists fail to recognize the truth in the state motto of ADA-author and Kansan Robert Dole, "Ad Astra Per Aspera," Latin for "To the stars through Adversity." As a disabled veteran, Senator Dole is a prominent personal example of how disability can actually foster excellence, rather than hinder it.

Case law recognizes that those recovering from alcohol and drug problems are persons with disabilities under the ADA. But there is at least one law review article referring favorably to Chief Justice Holmes' words in *Buck* to support eugenics for the disabled. The article urges judicial enforcement of contracts for sterilization of the disabled, apparently through judicial orders of specific performance, as a cheaper method of dealing with disabilities than providing assistance to live a productive life. See Jennifer Mott Johnson, "Reproductive Ability for Sale, Do I Hear $200?" 43 Ariz. L. Rev. 205 (Spring, 2001). One hopes that public policy against such things as organ selling, baby selling, or contracts in restraint of marriage also displays a public policy against contracts for sterilization and will prevent

Ms. Johnson's vision of eugenic contract enforcement from becoming law.

But the fact remains that state employees continue to cooperate in coercing the disabled to undergo sterilization merely because future children might experience a possibility of disability or merely of disadvantageous parenting. See *Vaughn v. Ruoff*, 253 F.3d 1124 (8th Cir. 2001). That case denied immunity to the state employee involved: "The fundamental right involved must be safeguarded to assure that sterilization is not a subterfuge for convenience and relief from the responsibility of supervision." (*Id.* at 1131).

In 1985, this Court held state action discriminating against the developmentally disabled in zoning laws was permissible so long as there was a rational government interest involved. The Court found that the disabled were not entitled to "quasi-suspect classification" status requiring more rigorous review of state action. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985). The record in the trial court showed a long and sorry history of discrimination: "Mental retardates have been segregated in remote, stigmatizing institutions . . . and when permitted in society, they have often been subjected to ridicule." *Cleburne Living Ctr. v. Cleburne*, 726 F.2d 191 (5th Cir. 1984). Only five years later, Congress decided such discrimination was in fact so odious that it passed the ADA.

Those disabled who were successfully put away from public view were found to be subjected to unconstitutional discrimination in *Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84 (3d Cir. 1979). The Court relied on governmental investigative reports showing that the functioning of the developmentally disabled could be greatly improved in their condition by treating them as normally as

possible given their individual levels of disability, citing B. Nirje, "The Normalization Principle, Changing Patterns in Residential Services for the Mentally Retarded," President's Committee on Mental Retardation (Rev. ed.1976).

Rather than treating the disabled with the same level of regard as for "normal" children, the state of Pennsylvania ensured that "the environment at Pennhurst is not merely inconsistent with normalization principles, but is actually hazardous to residents. Because of the inadequacies in programming attributable to staff shortages, residents were found to have lost skills already learned. Organized programs of appropriate education and training were found to be inadequate or unavailable." (*Id.* at 93.) Again, the short term cost figures were used as justification by the state, although the long-term cost of complete institutionalization (to segregate the disabled from society's view) is far greater.

In reaching its decision that such treatment was unconstitutional, the Court in *Halderman* was guided by Congress' findings of state discrimination and ill treatment of the disabled when it enacted the Developmentally Disabled Assistance and Bill of Rights Act in 1975, a full fifteen years before the ADA. 42 U.S.C. §§ 6001-6081. The legislative record for that Act notes that "Congress should reaffirm its belief in equal rights for all citizens including the developmentally disabled. Congress should provide the leadership to change the tragic warehousing of human beings that has been the product of insensitive Federal support of facilities providing inhumane care and treatment of the mentally retarded." (*Halderman, supra*, 612 F.2d at 96.)

Further, "Over the past few years, the horrifying conditions which exist in most of the public residential institutions for the mentally retarded and other

developmentally disabled persons have provided shocking testimony to the inhuman way we care for such persons." (*Id.* 105.) The finding that Congress intended to create substantive rights of action in favor of the disabled by the Act was reversed by this Court in *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981). With the ADA, however, Congress specifically provided for such remedies.

While disability is not a "suspect class," courts are not reluctant to find, in the face of reality, the immutable fact of discrimination against the disabled: "Although this court does not grant 'suspect class' status to the plaintiffs, it is acutely aware, from the evidence received at trial, of the extent to which the mentally retarded still suffer from some discrimination that is not related to actual disabilities." *Association for Retarded Citizens v. Olson*, 561 F. Supp. 473, 490 (D.N.D. 1982). Congress also so found, for all disabled persons, as shown below.

4. THE CONGRESSIONAL RECORD SHOWS KNOWLEDGE OF THE LEGACY OF FEAR AND PREJUDICE – AND A RESOLVE TO STOP IT

> "Unfortunately, the findings that Congress made during the extensive hearings held on this bill have not changed for generations. People with disabilities have encountered various forms of discrimination – from outright exclusion to overprotective rules to attitudinal, architectural, transportation, and communications barriers. People with disabilities have experienced a history of unequal treatment and have formed insular

> groups, segregated from the rest of society."
>
> 136 Cong. Rec. E1913, E1913 (ext. of remarks, June 13, 1990) (statement by Rep. Hoyer.)[3]

A national history of discrimination against the developmentally disabled, and against those with cancer, based on irrational fears that such might be "contagious" resulted in segregation and shunning of afflicted individuals. 136 Cong. Rec. S 7422, S7441 - S7442 (daily ed. June 6, 1990) (Letter from Affiliated Leadership League of and for the Blind and nearly 80 other organizations).

Shortly after the ADA was adopted, then President Bush wrote to Congress advising of his position on that act: "Discrimination, whether on the basis of race, national origin, sex, religion, or disability, is worse than wrong. It is a fundamental evil that tears at the fabric of our society, and one that all Americans should and must oppose. That requires rigorous enforcement of existing antidiscrimination laws. It also requires vigorously promoting new measures such as this year's Americans with Disabilities Act, which for the first time adequately protects person with disabilities against invidious discrimination." 136 Cong. Rec. S16562, at S16562 (daily ed. Oct. 24, 1990) (Letter from Pres. George W. Bush).

The President placed the ADA among past civil rights legislation which abrogated 11th Amendment immunity, and

---

[3] Relying on Louis Harris & Associates, "The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream" (1986); "Implications for Federal Policy for the 1986 Harris Survey of Americans with Disabilities" (1988).

stressed that such legislation had always been the product of admirable and broad bi-partisan efforts in Congress: "The Civil Rights Restoration Act, the Fair Housing Amendments Act, the Americans with Disabilities Act – none would be law today if it were not for the leadership of Republican as well as Democratic Senators." (*Id.* at S16563.)

The extraordinary rate of unemployment and discrimination against the disabled was reviewed through outside studies when Congress decided on means to implement the ADA. 136 Cong. Rec. S18123, S18127 (daily ed. Oct. 25, 1990) (statement of Sen. Simon). The existence of entrenched discriminatory attitudes, by private parties and by government entities, was recognized by Congress as the primary reason the ADA was needed:

> "For generations, society has viewed people with disabilities as citizens in need of charity. Through ignorance, we tolerated discrimination and succumbed to fear and prejudice. But our paternalistic approach did no more to improve the lives of people with disabilities than labor laws restricting women in the workplace did to protect women. Today we are shedding these condescending and suffocating attitudes – and widening the door of opportunity for people with disabilities. . . . '[E]qual justice under the law' is not a privilege – but a fundamental birthright in America."
>
> 136 Cong. Rec. S9680 at S9680 (daily ed. July 13, 1990) (ADA Conference Report, statement of Sen. Kennedy).

House members were swayed by the pervasiveness of discrimination against the disabled to vote in favor of the ADA. Representative Owens spoke extensively and eloquently of studies showing discrimination against those with HIV infections and sickle cell anemia, as well as the growing use of genetic testing, as a basis for his vote in favor of the ADA: "This Legislation will enable us to begin to make significant inroads in the legacy of disability discrimination in our country." 136 Cong. Rec. H4614, H4622-H4623 (daily ed. July 12, 1990) (statement by Rep. Owens.) One such study, "Epidemic of Fear," published in 1990 by the ACLU AIDS Project, was also cited by Rep. Edwards as showing the need for a law barring discrimination against those disabled or perceived to be medically or otherwise "unfit" when they were not. (*Id.* at H4624.)[4]

Senator Kennedy noted the genesis of the ADA in President Reagan's National Council on Disability and its 1988 report, "Towards Independence." That report, in turn, specifically discussed the depth of discrimination faced by the disabled, noting that international studies showed the disabled

---

[4] Astoundingly, a House member speaking just prior insisted that AIDS is spread by food and voiced outrage that "homosexuals" or others with HIV infections were not omitted from the definition of "disabled." The Secretary of Health and Human Services noted there was no such risk. See 136 Cong. Rec. S9519, at S9519 - S9520. (daily op. July 11, 1990) (Letter from Louis Sullivan.) The Congressman's comments are proof that prejudice continues to overcome science where disability is concerned. Other members of Congress pointed out such problems as the very reason the ADA was needed: "[I]t does much to deal with the mental concepts that have captured the minds of too many people in our society. As a result of ignorance, such mindsets have brought about the kind of disability related discrimination that has limited people with disabilities in so many ways and has prevented them from realizing their true potential." 136 Cong. Rec. S9527, S9530 (daily op. July 11, 1990.) (statement by Sen. Kennedy.)

were faced with both the "physical barriers" to entry into public and business facilities as well as "social barriers," disregard for their abilities or needs, as faced by Mr. Lane and Ms. Jones in this matter. (*Id.* at p. 8.) For this reason, the Council urged that a broad anti-discrimination law be passed, which "should also include an obligation to remove architectural, transportation, and communication barriers . . ." for the disabled. (*Id.* at p. 19.) The ADA was the result.

"Based on testimony and comments from hundreds of people with disabilities, parents, and others, the most pervasive and recurrent problem faced by disabled persons appeared to be unfair and unnecessary discrimination." 135 Cong. Rec. S10765, S10792 (daily op. Sept. 7, 1989) (statement by Sen. Biden.) Further, "The severity and pervasiveness of discrimination against people with disabilities is well-documented." 134 Cong. Rec. H2894, at H2894 (daily op. May 3, 1988) (statement by Rep. Owens.)

"Bringing Disabled Americans into the Mainstream," a nationwide poll conducted in 1986 by Louis Harris and Associates, underscores the conclusion that discrimination is a problem that people with disabilities frequently experience. Persons polled identified a variety of types of discrimination they had experienced, including workplace discrimination, denials of life and health insurance, denials of educational opportunities, lack of access to public buildings and public bathrooms, the absence of accessible transportation, and various forms of social rejection (others shying away or feeling sorry for them). This report was cited by Congress in deciding to adopt the ADA. 135 Cong. Rec. S4984, S4985 (daily op. May 9, 1989) (statement by Sen. Harkin).

Senator Hatch pointed to the history of discrimination as justification for the ADA: "For too long the valuable resources available to this Nation from individuals with disabilities have been wasted needlessly. Why? Because of senseless discrimination, intended or not, which subjected persons with disabilities to isolation and robbed America of the minds, the spirit, and the dedication we need to remain a competitive force in worldwide economy." 136 Cong. Rec. S9684, S9685 (daily ed. July 13, 1990) (statement by Sen. Hatch).

The historical and Congressional record demonstrates a lengthy history of discrimination, and a Congress unified across party lines to bring it to a complete halt, where ever it might occur, including where it was perpetrated by a state governmental entity.

5. CONCLUSION

The ADA is nothing more than Congress' continued and fully factually supported findings over the course of decades that the disabled are the subject of egregious discrimination by state entities. Its decision to afford private individuals substantive rights was made in the face of continuing discrimination despite its past findings and acts addressing specific groups of disabled people.

Thus, the question in this case is not whether or not there exists a record of discrimination against the disabled. Rather, the question is whether or not we will honor Congress' desire that the disabled be given full civil rights and the ability to enforce them against recalcitrant government entities that continue to bar them from full participation in American life. For the reasons stated herein, the Blanche Fischer Foundation submits that the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Dated: November 11, 2003.

Respectfully submitted,

GIANELLI & MORRIS

By: Sherril Nell Babcock
Counsel of Record

Counsel for Amicus Curiae
BLANCHE FISCHER FOUNDATION